

1 FEDERAL TRADE COMMISSION

2 I N D E X (PUBLIC RECORD)

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4 WITNESS: DIRECT CROSS REDIRECT RECROSS

5 Addanki 5939 6151 (SP) 6212

6 6171 (US)

7 6216 (US)

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9 EXHIBITS FOR ID IN EVID

10 Commission

11 Number 1712 6044

12 Number 1713 6152

13 Schering

14 None

15 Upsher

16 Number 1580 6194

17 OTHER EXHIBITS REFERENCED PAGE

18 Commission

19 CX 13 6015

20 CX 16 6040

21 CX 18 6039

22 CX 19 5986

23 CX 20 6037

24 CX 21 6025

25 CX 34 6007

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1	Commission	
2	CX 43	6010
3	CX 50	6138
4	CX 114	6103
5	CX 142	5966
6	CX 144	5967
7	CX 147	6102
8	CX 150	5973
9	CX 695	6125
10	CX 1389	6207
11	CX 1480	5974
12	CX 1490	5977
13	CX 1495	6022
14	CX 1586	6188
15	Schering	
16	SPX 954	5957
17	Upsher	
18	None	
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FEDERAL TRADE COMMISSION

In the Matter of: )  
SCHERING-PLOUGH CORPORATION, )  
a corporation, )  
and )  
UPSHER-SMITH LABORATORIES, ) File No. D09297  
a corporation, )  
and )  
AMERICAN HOME PRODUCTS, )  
a corporation. )  
-----)

Monday, March 4, 2002

10:30 a.m.

TRIAL VOLUME 25

PART 1

PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL

Administrative Law Judge

Federal Trade Commission

600 Pennsylvania Avenue, N.W.

Washington, D.C.

Reported by: Susanne Bergling, RMR

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1 P R O C E E D I N G S

2 - - - - -

3 JUDGE CHAPPELL: Good morning, everyone.

4 ALL COUNSEL: Good morning, Your Honor.

5 JUDGE CHAPPELL: Let's reconvene docket 9297.

6 Any Monday morning matters before we take our  
7 next witness?

8 MS. BOKAT: Good morning, Your Honor. I have a  
9 report on the doors.

10 JUDGE CHAPPELL: Good morning. Oh, thank you.  
11 The rock group or the back doors?

12 MS. BOKAT: Just the ones in the back of the  
13 courtroom.

14 Pursuant to the Court's request, we contacted  
15 the building people last week. They said they  
16 determined that the old door that fell cannot be  
17 repaired. So, they will have a new pair of doors  
18 constructed. That's why they took out the second one  
19 that was still standing. It's going to take them a  
20 couple of weeks to get the new doors constructed and  
21 installed.

22 JUDGE CHAPPELL: Okay, thank you.

23 MS. BOKAT: You're welcome.

24 JUDGE CHAPPELL: Anything else?

25 MR. NIELDS: Nothing from us, Your Honor.

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1 MR. CURRAN: Nothing from Upsher, Your Honor.

2 THE WITNESS: Good morning.

3 JUDGE CHAPPELL: Good morning, sir. You're the  
4 one. Have a seat there. I remind you you're still  
5 under oath.

6 THE WITNESS: Yes, sir.

7 Whereupon--

8 SUMANTH ADDANKI

9 a witness, called for examination, having previously  
10 been duly sworn, was examined and testified further as  
11 follows:

12 CROSS EXAMINATION (cont)

13 BY MR. ORLANS:

14 Q. Good morning, Dr. Addanki. How are you?

15 A. Good morning, Mr. Orlans.

16 Q. Dr. Addanki, before we go through your test, I  
17 would like to step back and get something of an  
18 overview.

19 The first part of your test is monopoly power  
20 coupled with a threat to such power.

21 A. That's right.

22 Q. And these are the same as Dr. Bresnahan's first  
23 two elements. Is that correct?

24 A. The questions are the same, that's right.

25 Q. Okay. And you've essentially collapsed them

1     into one question. So, if we talk about the first  
2     element of your test, we'll be talking about monopoly  
3     power and a threat to that power. Is that okay?

4           A. That's fine.

5           Q. The next part of your test compares the  
6     settlement entry date with the expected outcome under  
7     litigation, which you attempt to derive, is that right,  
8     or have someone derive?

9           A. No, I think the next part of my test is simply  
10    to compare the actual outcome under the settlement with  
11    the expected outcome of litigation. I'm not sure what  
12    you mean about the part about "derive," I guess.

13          Q. Well, what -- I'm sorry. What I meant was that  
14    you'd simply have to derive the expected outcome date  
15    under litigation in order to compare it against the  
16    settlement entry date.

17          A. You would have to evaluate it. I'm not sure  
18    that's the same thing as "derive." I don't mean to  
19    quibble, but certainly I would express it as you need  
20    to evaluate the expected entry date under litigation.

21          Q. You need to come up with one, right?

22          A. That's right.

23          Q. Okay. And isn't it true, sir, that you've made  
24    no independent analysis of the odds of either party  
25    prevailing in this -- in the patent litigation?



1           A. That's correct.

2           Q. And if we assume that Schering had monopoly  
3 power, you don't know if the agreement between Schering  
4 and Upsher was anti-competitive. Is that right?

5           A. Right, if we assume that Schering had monopoly  
6 power in K-Dur 20, I have not carried out the part of  
7 the test that says what would have been the outcome  
8 under litigation. That's correct.

9           Q. And the same would be true of the agreement  
10 between Schering and ESI, correct?

11          A. That's correct.

12          Q. And the reason you don't know, as you said, is  
13 you haven't independently attempted to apply either --  
14 the last two elements of your test, either the expected  
15 outcome of litigation or the overall consumer welfare.  
16 Is that correct?

17          A. That's correct.

18          Q. Now, you state in your report -- and this is at  
19 page 38 if you would like to check, I think there's  
20 still a copy of your report up there for you.

21          A. Can you point me to it?

22          Q. I think I buried it under one of the books.  
23 No, to your left.

24          A. Okay, yes.

25          Q. Okay.

1           A. Did you say 38, Mr. Orlans?

2           Q. Page 38, yes. I think at page 38 of your  
3 report you stated that even if there was monopoly power  
4 and a threat to such power, the settlement "may well  
5 have been pro-competitive."

6                   Isn't that right? Is that what you said?

7           A. That's right, that's the title of Section C  
8 there.

9           Q. Okay, but as we just discussed, sir, you didn't  
10 apply your test beyond the market power screens, did  
11 you?

12          A. No, that's why it says it "may well have been"  
13 rather than --

14          Q. And it may not have been. Isn't that also  
15 correct?

16          A. That's implied by the statement "it may well  
17 have been."

18          Q. I see. So, the bottom line is you just don't  
19 know whether it is or isn't, correct?

20          A. Well, whether it is or isn't, because I know  
21 they don't have monopoly power.

22          Q. But putting aside or assuming they don't have  
23 monopoly power, you don't know whether the other  
24 elements of your test are or aren't met.

25          A. Well, in the hypothetical situation where you

1 do assume monopoly power, I have not carried out the  
2 second and third elements of the test, that's right.

3 Q. But your report doesn't say that if you assume  
4 monopoly power, you don't know how the -- what the  
5 outcome would be, does it? In other words, your report  
6 says it may well be pro-competitive. Your report  
7 doesn't say I don't know what the outcome would be.  
8 Isn't that right?

9 A. Well, I would certainly take exception to that.  
10 If the -- if the title says, "It may well have been  
11 pro-competitive," it's very clearly not saying I have  
12 concluded that it is pro-competitive.

13 Q. I see. It's also not saying you don't know, is  
14 it?

15 A. Well, that's what's implied by the title.

16 Q. You think so, okay.

17 You also say there may not have been a net  
18 payment to Upsher. In fact, insofar as a net payment  
19 to Upsher is concerned, you haven't reached any  
20 conclusions, any independent conclusions, as to whether  
21 there was or was not a net payment from Schering to  
22 Upsher, correct?

23 A. I have not evaluated the Niacor agreements;  
24 however, I will say -- and I think it's in the report  
25 somewhere -- that given that I've concluded based on

1 the evidence that there is no monopoly power, to the  
2 extent that one can infer anything about the payment or  
3 the lack thereof from the fact that there isn't  
4 monopoly power, I would say the inference is in the  
5 direction that there was no net payment.

6 Q. But again, putting aside the question of  
7 monopoly power, you've made no independent judgment as  
8 to whether there is or is not a net payment.

9 A. I have not evaluated Niacor, yes.

10 Q. Doctor, your test says nothing about a net  
11 payment. Is that included in some way in your test?

12 A. I think I went into this in my direct. My test  
13 is predicated on the assumption that there was a net  
14 payment. So, the entire test -- and I think we talked  
15 about that when I was testifying on Thursday. The  
16 assumption here is that a net payment has been made,  
17 and you're taking it from there.

18 Q. So, if there had been no net payment made, you  
19 wouldn't even use your test. Is that correct?

20 A. Well, based on the case that the FTC has  
21 assembled and the expert testimony of Dr. Bresnahan,  
22 Professor Bresnahan, it seems to me that if there were  
23 no net payment, we wouldn't be here, or if there were  
24 no accusation of there having been a net payment, we  
25 wouldn't be here. So, beyond that, I'm not sure how to

1 interpret your question.

2 Q. Well, I'm trying to understand your test.  
3 Let's put Professor Bresnahan and his approach aside  
4 for the moment, and here's the question that I'm asking  
5 you, Doctor:

6 If we assume in this hypothetical that  
7 there's -- that there is monopoly power and we're  
8 dealing with a pure patent split with no money changing  
9 hands, so the companies that are involved with the  
10 patent lawsuit simply set an agreed entry date, okay --  
11 are you with me so far?

12 A. Yes.

13 Q. Okay. In that situation, would you compare the  
14 date that those two companies set to the expected  
15 outcome under litigation or not?

16 A. What I'm I suppose having a little difficulty  
17 understanding is based on the evolution, as I  
18 understand it, of how we got to where we are, why would  
19 there have been any question at all had there been no  
20 indication whatsoever of any payment of any kind? So,  
21 I guess in what context are you talking about?

22 Q. This is purely hypothetical, Doctor. I  
23 understand that we are alleging a net payment here,  
24 but -- or a reverse net payment, but I'm trying to  
25 understand your test, and in particular what I'm trying

1 to understand is in a situation where there was  
2 monopoly power, where two companies agree upon an entry  
3 date, okay, in that situation, would you suggest that  
4 your test is inapplicable because there had been no  
5 reverse net payment or would you go ahead and analyze  
6 it under the rest of the elements of your test?

7 A. Given that I've put the whole thing together  
8 as -- partly in response to what the FTC and Professor  
9 Bresnahan have proffered and partly as the test makes  
10 pretty clear as a test to analyze the competitive  
11 consequences of the reverse payment, I guess I haven't  
12 thought very much about whether you would apply it at  
13 all if there were no reverse payment or no suggestion  
14 of a reverse payment, but I -- having said which, I  
15 suppose my -- my instinct would be why would you even  
16 look? But I can't say that that's the result of any  
17 profound deliberation on my part. It's just an  
18 off-the-cuff answer right now.

19 Q. Well, the question I have for you, then, is  
20 isn't it possible in my hypothetical situation that the  
21 settlement date agreed upon by the two parties could  
22 nonetheless fall outside the expected entry date under  
23 litigation, assuming one could be computed?

24 A. I see. I think I understand -- I think I  
25 understand the sense of your question, and I guess the

1     answer is it may well happen. You probably wouldn't  
2     know, because you probably wouldn't have looked in the  
3     first place.

4           Q. But if you had looked, is that something that  
5     is problematic or raises issues of anti-competitive  
6     behavior in your view?

7           A. No, because I think we start this whole  
8     exercise where you started it, which is is there a  
9     payment? And if there is no payment, I think you go  
10    home anyway. So -- because the fact is that an  
11    agreement that was entered into with the best of  
12    intentions that turns out ultimately, because  
13    circumstances turned out the way they did, to have some  
14    sort of effect that you could detect ex post, it seems  
15    to me there's the potential for that kind of agreement  
16    all over the place if you looked hard enough, but I  
17    think the initial screen, which is you don't even look  
18    if there's no monopoly power, probably you don't even  
19    look if you don't have any suspicion of a payment, is  
20    still the right one.

21          Q. Well, let me ask you this: Is one of the  
22    reasons that you wouldn't even look, does that have to  
23    do with the fact that the parties in a pure patent  
24    split situation essentially have an incentive to  
25    compete with one another; that is, the brand would like

1 to keep the generic out, the generic would like to get  
2 in as soon as possible, and so the incentives are such  
3 that essentially they're competing in the context of a  
4 settlement? Is that the reason that you wouldn't look  
5 further at that kind of agreement?

6 MR. SCHILDKRAUT: Objection. I think that's an  
7 ambiguous, compound question. He's got so many  
8 conditions in it, I don't know that anybody can answer  
9 it.

10 MR. ORLANS: Well, let's see if the witness can  
11 answer it, Your Honor.

12 JUDGE CHAPPELL: Well, I will sustain the  
13 compound part, technically compound, there's more than  
14 question, although I think you were just tightening  
15 your question a little bit.

16 MR. ORLANS: I was just elaborating.

17 JUDGE CHAPPELL: But still. I will let the  
18 reporter read the first question. Let me know if you  
19 understand that.

20 (The record was read as follows:)

21 "QUESTION: Well, let me ask you this: Is one  
22 of the reasons that you wouldn't even look, does that  
23 have to do with the fact that the parties in a pure  
24 patent split situation essentially have an incentive to  
25 compete with one another?



1 JUDGE CHAPPELL: Do you understand that?

2 THE WITNESS: Yes, I do.

3 JUDGE CHAPPELL: So, I will overrule the vague  
4 objection.

5 You may proceed.

6 THE WITNESS: Thank you, sir.

7 No, I don't think it's that. I think it's more  
8 that when parties are bargaining at arm's length, you  
9 assume -- and they don't have to be competitors -- you  
10 assume that each side is trying to do the best that it  
11 can, and I don't think it has anything to do with  
12 competition.

13 BY MR. ORLANS:

14 Q. But they are each trying to do the best that  
15 they can, and in this situation, the best that they can  
16 would involve some competition, wouldn't it? In other  
17 words -- let me rephrase it.

18 The basic incentive in that situation is that  
19 the brand would like to delay competition and the  
20 generic would like to get in as soon as possible,  
21 correct?

22 A. Well, certainly the branded product would  
23 prefer not to have generic competition. The generic  
24 competition would like to be in there. So, that's  
25 true.

1           Q. Okay. And isn't it also true that once you get  
2 into the situation of a reverse payment, that those  
3 incentives change?

4           A. I can't imagine why you say that.

5           Q. Well, because now the brand is in a position  
6 where it could pay the generic and make it worth the  
7 generic's while to stay out for a longer period of  
8 time. Isn't that right?

9           A. If you mean that one of the -- that -- see, I  
10 don't think the incentives change. The incentives are  
11 still the same, but if your question is do you -- do  
12 you even raise a question when you suspect that there  
13 may be a payment because you think there may have been  
14 a payment being made for -- for reasons having to do  
15 with change of the entry date, I'd say certainly that's  
16 the reason why you look in the first place. So, yes.

17          Q. Okay, let's talk for just a moment about the  
18 third element of your test.

19                 Is it your position, sir, that the availability  
20 of a lower-priced generic does not enhance consumer  
21 welfare?

22          A. It's my opinion that there are two potential  
23 effects, and I don't think there's an unambiguous  
24 answer one way or another. One effect is that, as we  
25 talked about on Thursday, you get a lower-priced

1 product taking sales from a higher-priced product.  
2 That, in fact, does happen. So, the average price in  
3 the marketplace does go down.

4 But the other thing that happens, and we've  
5 seen it happen in spades in this business, in the  
6 potassium chloride business, is that certain  
7 pro-competitive activities, like advertising and  
8 promotion and information dissemination that the  
9 branded manufacturing was undertaking, some of which  
10 could be potentially very valuable, and as the  
11 documents in the Schering situation certainly are  
12 replete with examples with that, the incentives to  
13 engage in those activities go away, and they go away  
14 because you're not going to realize the returns to  
15 those activities and those investments.

16 So, because you've got -- and that's bad for  
17 consumers. That is not a pro-competitive effect. It  
18 is an output-reducing effect, and it has to be offset,  
19 and its strength in particular has to be offset against  
20 the benefit of the lower price, and that's why I say  
21 you've got two effects going, one in one direction and  
22 the other in the opposite direction, and you don't know  
23 how it nets out, and I don't think I've reached any  
24 conclusion in this case as to how it nets out.

25 Q. Okay. So, your view is that generic entry is

1 not necessarily positive in terms of consumer welfare.

2 Is that right?

3 A. That's correct.

4 Q. Okay, we'll come back to that in a while and  
5 see if we can't get a better handle on that.

6 As a matter of economic theory, Doctor, a  
7 monopolist will price in the elastic portions of its  
8 demand curve. Is that correct?

9 A. That's certainly conventional economic theory,  
10 that's right.

11 Q. And that means that it would price at a point  
12 in its demand curve where further increases in price  
13 would lead to significant substitution away from its  
14 product. Isn't that right?

15 A. I think that's true about every firm in the  
16 market, not just monopolists.

17 Q. So, isn't it true that a monopolist may appear  
18 to have many competitive substitutes, but the  
19 appearance of competition could be created simply by  
20 the monopoly pricing?

21 A. I guess the problem with that question is that  
22 if we're talking about what creates elasticity -- it's  
23 true that the monopolist prices at the elastic portion  
24 of the demand curve, in other words, any further price  
25 increase will result in sales diminishing more than it

1 will be worthwhile -- let me state it slightly  
2 differently.

3 The loss in sales would more than offset the  
4 advantage of the higher price. That's not just for  
5 monopolists, though; that's for every firm in the  
6 economy. Every firm in the economy that has the  
7 ability to choose its price will choose its price  
8 recognizing that reality.

9 The question really is, is the firm, in fact,  
10 setting its price without regard to active competition  
11 from others, right, or is the firm setting its price  
12 saying if I price any higher, there are a raft of  
13 competitors out there, and I'm competing with all of  
14 them? And so I guess, to respond to your question,  
15 when you have evidence that a firm, in fact, is looking  
16 at all of its competitors, paying a great deal of  
17 attention to what they do, and its documents reflect  
18 kind of a continuing efforts on the firm's part to  
19 protect itself from competition and to take sales away  
20 from the competition, I guess your invocation of the  
21 cellophane fallacy I guess is just misplaced. I don't  
22 think that's the kind of thing that's going on.

23 Q. Well, I understand that you don't think so,  
24 Doctor, but as long as you've mentioned the cellophane  
25 fallacy, why don't you explain for the Court exactly

1     what that is.

2           A.   The point there, Your Honor, is just this:  If  
3     you have a monopolist, someone who sells a product that  
4     really doesn't compete with anything else, that  
5     monopolist will set its price high enough that any  
6     further price increases will no longer be worthwhile,  
7     because the sales lost -- for whatever reason, the  
8     sales lost will outweigh the benefits of any further  
9     price increase, and that's the notion of the elastic  
10    portion of the demand curve.

11           Could I draw it on the board, Your Honor?  
12    Would that help?  Would that help?

13           MR. ORLANS:  I don't find it necessary, Your  
14    Honor, but it's up to you.

15           JUDGE CHAPPELL:  You're welcome to do that if  
16    counsel who called you as a witness wants you to do  
17    that, but you don't need to do that for me.

18           THE WITNESS:  That's fine.

19           The idea of the cellophane fallacy is back in  
20    the cellophane case, and I'm not an antitrust  
21    historian, but I know enough about this particular  
22    issue to have some knowledge of it, there was a  
23    conclusion reached that cellophane competed with other  
24    packaging materials, packing materials, wraps of  
25    various kinds, and that's because evidence was

1 presented that if the price of cellophane went up any  
2 further, it would, in fact, lose sales to other  
3 wrapping materials, and on that basis it was concluded  
4 that, in fact, cellophane was not a monopoly.

5 My understanding of the subsequent history is  
6 that people who evaluated that same evidence, or at  
7 least evaluated that case later, said, well, why would  
8 you expect cellophane to be pricing at any level other  
9 than the level where it would lose sales to  
10 competition, even if it were a monopolist?

11 Now, I have not looked into cellophane itself  
12 to determine the truth of that assertion one way or the  
13 other. I have not looked at any of those documents or  
14 anything, but I have looked at the documents in this  
15 case, and in this case, the evidence is pretty clear  
16 that what Schering had to offer, where it was pricing  
17 and how it viewed its competition is not a situation  
18 that -- that at all evokes the cellophane trap.

19 Q. Well, I hadn't really asked you about this  
20 case, Doctor, we were talking about economic  
21 principles, and we will certainly come to the facts of  
22 this case, but isn't it true, then, that a monopolist  
23 may raise its price sufficiently above competitive  
24 levels that it eventually faces competition from other  
25 products? Yes or no.

1           A. Yes.

2           Q. Okay. And if you looked at the business  
3 records of the monopolist under those circumstances, it  
4 would view these other substitutes that had come into  
5 being by virtue of its monopoly pricing, it would view  
6 these products as substitutes and -- that it was  
7 competing against, would it not?

8           A. I'm trying to think back on the cases where I  
9 have looked at documents and there was arguably  
10 monopoly power on the part of the business we're  
11 talking about, and I guess my recollection certainly is  
12 that the way competitive threats are viewed when they  
13 are threats at the fringe of a market demand curve that  
14 a monopolist faces -- because that's what a monopolist  
15 is, a monopolist supplies the whole market -- they are  
16 very different in flavor and how they're written from  
17 documents for a company that really feels that they're  
18 competing every day with a bunch of different firms.

19          Q. But given that the monopolist would encounter  
20 this competition at the margins, wouldn't it view those  
21 firms at the margins as its competitors?

22          A. Yes, but it's really a qualitative issue as to  
23 what those documents look like, and having looked at  
24 lots and lots and lots of documents, I guess my sense  
25 is you can tell when a firm views competition as kind



1 of a distant fringe to worry about at the periphery of  
2 the market that it serves versus a firm that views this  
3 as an everyday trench war.

4 Q. Sir, wasn't it Schering's pricing policy on  
5 K-Dur to increase price annually while monitoring the  
6 price of non-A-B generics so as to avoid being too  
7 aggressive in pricing and precipitating undue  
8 substitution?

9 A. I think Schering looked at generic as well as  
10 branded competition's pricing and viewed itself  
11 definitely as competing with the whole raft of products  
12 in the marketplace.

13 Q. Let me direct your attention, sir, to SPX 954.  
14 That's found in your book Volume 1 at tab 21 and in  
15 particular to page 953. Whoops, I had it and then I  
16 lost it.

17 MR. SCHILDKRAUT: Your Honor -- excuse me, Your  
18 Honor, this monitor seems to be out. I wonder if  
19 there's a way we can get this monitor up.

20 JUDGE CHAPPELL: We will take a pause while  
21 someone jiggles the wires I guess.

22 (Pause in the proceedings.)

23 BY MR. ORLANS:

24 Q. Okay, this is the 1996 K-Dur marketing plan,  
25 correct, sir?

1           A. Yes, that's what it says, correct.

2           Q. Okay. And under Pricing Strategies, it reads,  
3 and I quote:

4                 "The K-DUR pricing strategy is to increase net  
5 direct annually while constantly monitoring the prices  
6 of competitive 8/10 mEq products. Generically priced  
7 10 mEq tablets/capsules are available at a cost below  
8 one-half of the K-DUR 20 price; which means an overly  
9 aggressive pricing strategy could precipitate  
10 therapeutic substitution (two 10 mEq tablets for one 20  
11 mEq tablet). Therefore, appropriate (4 to 6%) price  
12 increases are forecast. Additionally, a price  
13 sensitivity study will be implemented to determine at  
14 what price a shift to therapeutic substitution would  
15 occur by customer segment (retail, managed care, et  
16 cetera)."

17                 Do you see that?

18           A. Yes.

19           Q. Isn't that an indication to you, sir, that  
20 Schering was trying to position itself in such a way  
21 that it could raise prices as much as possible without  
22 precipitating generic substitution?

23           A. The very first sentence of your quote is, "The  
24 K-DUR pricing strategy is to increase net direct while  
25 constantly monitoring the prices of competitive 8/10

1 milliequivalent products." That's every product in the  
2 market that's a tablet or a capsule, not necessarily  
3 only tablets or capsules. I mean, the other stuff  
4 shows up as 10s as well. So, you know, they do have a  
5 note about generically priced 10 milliequivalents being  
6 priced at some level, but the first sentence says  
7 they're looking at everything.

8 Q. So, you don't think the focus of this is on  
9 generics?

10 A. Well, the point is there are so many documents,  
11 and all the documents are full of their -- their  
12 competition with generics, and so even if you look at  
13 your quote here, the very first sentence says  
14 competitive 8s and 10s.

15 Q. Didn't you in your own direct testimony, sir,  
16 point out that Schering was particularly concerned  
17 about the pricing and positioning of the non-A-B  
18 generics? Wasn't that the primary thrust and focus?

19 A. I think Schering recognized two things. One,  
20 that that was the fastest-growing segment, apart from  
21 the K-Dur 10 and 20, and two, that as managed care's  
22 role increased in the health care segment, you were  
23 going to see them, managed care providers --  
24 organizations, inducing more substitution to generics.  
25 So, definitely they viewed generics as a significant

1 issue, but that doesn't mean they weren't competing  
2 with the whole market.

3 Q. Well, let me ask you this: In a situation  
4 involving the cellophane fallacy that we've been  
5 discussing, if you were attempting to assess market  
6 power, the evidence of substitution of products for the  
7 monopoly product at the margin wouldn't tell you  
8 anything, would it?

9 A. When you take it with -- when you view it in  
10 the totality of the evidence, it tells you everything  
11 you need to know, and here what you have is a situation  
12 where that priced comparably to the branded products,  
13 the generic-priced products are priced below all the  
14 branded products, which is exactly what always happens  
15 with generic products, and the Schering documents talk  
16 about how they're competing with everything, generics  
17 as well as branded products.

18 So, if you look at the evidence in totality,  
19 the point is that, as I'd said before, you don't have  
20 the situation that -- you don't have a fact set that  
21 suggests anything like the cellophane problem.

22 Q. Well, again, we'll go through the documents,  
23 but let me ask you as a matter of economic principle,  
24 sir, the fact that a monopolist has competitors doesn't  
25 mean it's not a monopolist. Isn't that right?

1           A. The fact is that every firm has competitors,  
2           and every firm is pricing in the elastic portion of its  
3           demand curve. So, the fact that -- the fact that --  
4           sorry, let me start that answer again.

5           You cannot use the cellophane argument -- one  
6           cannot use, as a matter of economics, the cellophane  
7           arguments to disregard evidence of substitutability  
8           just because monopolists price on the elastic portion  
9           of the demand curve. That's just over the top, I'm  
10          afraid.

11          Q. Well, we will be discussing I can assure you  
12          the question of substitutability at some length, but  
13          right now I would just like you to agree with the  
14          general principle that the fact that a monopolist has  
15          competitors doesn't mean that it's not a monopolist.  
16          Isn't that right?

17          A. No, I think that's not right. I think a  
18          monopolist by definition doesn't have competitors.  
19          That's what a monopolist is.

20          Q. Are we talking about how a monopolist raises  
21          its prices to the point where it encounters  
22          competition?

23          A. No, we're talking -- what we're talking about  
24          is that a monopolist does, in fact, price at the  
25          elastic portion of its demand curve. The -- the source

1 of the elasticity may be a number of different things.  
2 It may be the -- people just doing without, may be  
3 other products, may be all kinds of things, but the way  
4 the firm behaves tells you a lot about whether that  
5 firm really is a monopolist in a market unto itself or  
6 is, in fact, competing with a raft of other firms on a  
7 day-to-day basis.

8 Q. Bottom line, sir, a monopolist raises its  
9 prices to the point where it eventually encounters  
10 competition. Yes or no.

11 A. No, a monopolist raises its price to the point  
12 where the demand curve is elastic, and the demand curve  
13 could be elastic for a number of reasons.

14 Q. You recognize the book of Carlton and Perloff  
15 as a standard industrial organization treatise, do you  
16 not, sir?

17 A. It's one of the treatises that's out there,  
18 yes.

19 Q. Let me direct your attention to a portion at  
20 page 612. It reads:

21 "Even a monopoly may raise its price  
22 sufficiently above competitive levels so that  
23 eventually it faces some competition from other  
24 products."

25 Do you agree or disagree with that, sir?

1           A. With the word "may," I agree.

2           Q. Okay. On Thursday, sir, you also talked a bit  
3 about advertising and monopoly power. Do you recall  
4 that conversation that you had with Mr. Schildkraut?

5           A. I do remember that we talked about it, yes.

6           Q. Okay, let me address your attention to another  
7 portion of the Perloff text. This is at page 454, and  
8 it reads:

9                   "By convincing consumers that its product has  
10 certain desirable traits, a firm can differentiate its  
11 product from others. As its product becomes  
12 differentiated, a firm may face a higher and less  
13 elastic demand curve, so that it can charge a higher  
14 price and earn greater profits."

15                   Do you agree with that? Oh, I'm sorry, I  
16 didn't mean to take it away.

17           A. Yes, it would be nice if you would leave it  
18 there for a minute.

19           Q. And it goes on to say, "For example, one  
20 heavily promoted brand of bleach sells at a much higher  
21 price than many other physically identical bleaches."

22           A. Yes, this is exactly the demand-expanding role  
23 of advertising and promotion that we were talking about  
24 on Thursday.

25           Q. And what the text is referring to here is the

1 fact that by differentiating your product through  
2 advertising, you can move to a less elastic demand  
3 curve and charge a higher price, correct?

4 A. Well, what it's really saying -- and it's a bit  
5 of a shortcut. The mechanism of what's going on here  
6 is kind of summed up by this sentence, but what's  
7 really going on is that the advertising and the  
8 promotion move the demand curve out, which means that  
9 at any price, more product will be demanded. It then  
10 turns out in some instances that the optimal point on  
11 that demand curve for the firm to be operating may, in  
12 fact, correspond to a higher price and less elasticity  
13 and a higher profit margin. That could, in fact,  
14 happen, that's right, but it starts -- the mechanism  
15 starts out by the demand expanding, the demand curve  
16 expanding outward with the promotion and advertising.

17 Q. But the net result could be a more inelastic  
18 demand curve and a higher price.

19 A. That's exactly why we speak about the premium  
20 to the brand, for instance, is an instance of that.

21 Q. Is it your testimony, sir, that branded  
22 products cannot have market power as long as there are  
23 nonbranded alternatives?

24 A. No, I don't believe I ever testified to that  
25 effect, no.



1           Q. Okay. So, for example, when Mr. Schildkraut  
2 brought out his samples of laundry detergents, if all  
3 the branded laundry detergents were to merge together,  
4 you wouldn't suggest that this would not be a subject  
5 of concern because there were generic alternatives,  
6 right?

7           A. I haven't the slightest idea what one would  
8 conclude in a transaction -- a hypothetical transaction  
9 like that. You'd have to look at it.

10          Q. If you define the market for K-Dur 20 -- let me  
11 rephrase that.

12                 If you define the market as consisting of K-Dur  
13 20 and its A-B generics, if any, prior to the entry of  
14 Klor Con M20, K-Dur had 100 percent of this market,  
15 correct, by definition?

16          A. By definition, that's right.

17          Q. Okay. And also prior to the entry of an A-B  
18 generic for K-Dur 20, K-Dur 20 had 100 percent of 20  
19 mEq potassium chloride pill sales, correct?

20          A. I think there were some 20 milliequivalent  
21 effervescent tablets out there.

22          Q. Well, pills -- capsules and tablets is what I'm  
23 referring to, something that you swallow as opposed  
24 to --

25          A. Okay, yes, that would be right.

1           Q. And Schering forecasted that entry by an A-B  
2 generic would be at 50 percent of the price of K-Dur 20  
3 and would gain 50 percent of K-Dur 20's market share.  
4 Isn't that right?

5           A. There are a whole raft of different forecasts  
6 that were made at different times. If that was one of  
7 them, so be it. I couldn't --

8           Q. You don't recall that?

9           A. -- reproduce to you all of those. No, I don't  
10 know all of the different forecasts that were done.

11          Q. Let me ask you to turn to tab 7 of Volume 1,  
12 and that would be CX 142.

13                 Rachel, can we pull that -- I need to do this,  
14 and Rachel, I'd like CX 142, and then flip it to page  
15 004. Okay, can we more clearly bring up the note in  
16 the left-hand corner, Rachel? Yeah.

17                 Do you see that, sir, that they assume -- and  
18 this is a Schering document, by the way. Is that  
19 correct?

20          A. That's what the Bates number says, yes.

21          Q. Okay. And it says that Warrick assumes 50  
22 percent of lost K-Dur volume at 50 percent of the  
23 price, correct?

24          A. Right.

25          Q. Okay. So, again, in this projection, the

1       assumption that Schering is making is that the generic  
2       would come in at 50 percent of the price and cost K-Dur  
3       50 percent of its sales. Is that right?

4           A. I'm not sure that's what the assumption is,  
5       because if you look at it, what it's saying is that  
6       Warrick would get 50 percent of the lost K-Dur volume,  
7       and that with Warrick and two other generic competitors  
8       in there, you would have a price that's 50 percent of  
9       the price. So, I guess I can't conclude from that that  
10      one generic competitor coming in would come in at 50  
11      percent of the price and take 50 percent of the volume.

12          Q. Okay, Rachel, could we have CX 144, please. Is  
13      that legible? Can we blow it up a little bit?

14           Okay, this is another example of a -- I don't  
15      have that in your book, I'm sorry, would you like to  
16      use a hard copy?

17          A. It doesn't matter. If I can read it on this,  
18      it's good enough.

19          Q. Okay. Actually, let me approach and give you a  
20      hard copy.

21           Can I approach, Your Honor?

22           JUDGE CHAPPELL: Yes, you may.

23           THE WITNESS: Thank you.

24           BY MR. ORLANS:

25          Q. Now, this is another Schering projection. Is

1       that correct, sir?

2           A. That's what it looks like. Give me a second to  
3       just look it over.

4           Q. Okay.

5           A. I must tell you that this is barely legible  
6       even with my glasses on. Which page did you want me to  
7       look at?

8           Q. The first page, sir.

9           A. Yes, sir.

10          Q. Okay. And under the -- okay, under the --  
11       there are three different scenarios, the downside, the  
12       realistic and the optimistic. Now, let's look at the  
13       realistic scenario, and under that scenario, doesn't  
14       that show that the generic direct price would be 50  
15       percent of the brand?

16          A. Yes. See, again, I don't know how many  
17       generics they're assuming here, and if it's -- if it is  
18       parallel to the last one you showed me, that would be  
19       two generics other than Warrick plus Warrick, right,  
20       which would be three generic firms showing a 50  
21       percent -- is that 50 or 60? I can't tell.

22          Q. I think it's 50. Rachel, can we blow that up a  
23       little bit?

24               MR. NIELDS: If you blow it up on the screen,  
25       it's 60.

1 THE WITNESS: It looks like 60.

2 BY MR. ORLANS:

3 Q. Could we get the number under market share,  
4 generic --

5 A. The trouble is you don't have the premium price  
6 in here, do you?

7 Q. I think it looks like -- Doctor, I think even  
8 with your glasses you may be able to see that the  
9 bottom scenario, the optimistic one, is the 60 percent  
10 of brand, and that price differs from the top two  
11 scenarios, including the realistic, which are 50  
12 percent. Does that help clarify it for you? And then  
13 you can see that you're dealing with 50 versus 60.

14 A. Well, yeah, but downside and realistic are  
15 both -- I mean, I guess what I don't know is whether  
16 it's optimistic because of the branded price going up  
17 or for any other reason.

18 Q. All right, well, all I'd like to focus on right  
19 now is the realistic assessment or the realistic  
20 forecast, I should say, and the number that I'd like to  
21 establish says 50 percent of the -- that the generic  
22 direct price would be 50 percent of the brand.

23 Can we push that up again, Rachel, and see if  
24 that's -- how legible that is? Unfortunately, still  
25 not legible.

1           A. Well, it looks like 60 frankly.

2           Q. Okay. Let's look, sir, to the last page of the  
3 document, which is 0005.

4           A. Okay.

5           Q. And at the bottom there you can find the actual  
6 prices, the direct prices, and if you look under the 20  
7 mEq per hundred, you can see a price of \$35.95, and if  
8 you compare that to the line on page 001 of \$17.98,  
9 that would be 50 percent, correct?

10          A. Yes, that looks right.

11          Q. Okay.

12          A. Although I must confess that that really does  
13 look like 60.

14          Q. Okay, but we have now established that, in  
15 fact, it is 50, right?

16          A. Well, I don't know what we've established.  
17 We've established that there is a page over here that  
18 has a \$35.95 on it, but let's assume for purposes of  
19 your question, if you like, that this says 50 percent.

20          Q. Well, I would like to have you agree, Doctor,  
21 that the -- that the price that's listed here is 50  
22 percent of the direct price that's listed on page 005.  
23 Is that right?

24          A. I have no problem with agreeing with you that  
25 the \$17.98 is 50 percent of \$35.95.

1 Q. Okay.

2 A. I just don't know what that means.

3 Q. Okay. Well, that is part of the forecast, that  
4 they're assuming or that they're dealing with a  
5 situation where the generic direct price is 50 percent  
6 of the branded price. Isn't that right?

7 A. They are dealing with a situation where with  
8 multiple generic firms in the marketplace, including  
9 Warrick -- and I'm afraid we don't know how many  
10 generic firms in the marketplace -- there is a price  
11 which is either 50 or 60 percent of the branded price,  
12 that's right.

13 Q. Well, and in fact, isn't it true that this  
14 scenario envisions Warrick and one other generic,  
15 because they're assuming that Warrick would get 50  
16 percent of the market share and that the generics would  
17 take 50 percent overall, so that Warrick would have  
18 essentially 50 percent of 50 percent or 25 percent?

19 A. Yeah, but there's no assumption that there's  
20 only one generic there other than Warrick, because  
21 that's exactly the scenario you had in the last thing  
22 you showed me.

23 Q. Doctor, if the generic -- oh, I see, you're  
24 suggesting that there might be other generics splitting  
25 the remaining 50 percent?

1           A. The very last thing you showed me was one where  
2       Warrick was getting 50 percent of the generics sales,  
3       and there were two generics other than Warrick. So,  
4       I -- it's not clear to me why you can assume anything  
5       about the number of generics here that's contrary to  
6       that.

7           Q. Well, let me ask you this, sir: Isn't it clear  
8       that Schering was forecasting that entry by an A-B  
9       generic would be at 50 percent of the price and would  
10      gain substantial market -- a substantial portion of  
11      K-Dur 20's market share?

12          A. No, what this tells us is that if Warrick and  
13      one and possibly two, actually more likely two given  
14      what you've just shown me, generics were in the market,  
15      which would then make it K-Dur 20 plus three A-B rated  
16      generics, that the generics would have 50 percent of  
17      the market, and the price would be 50 or 60 percent of  
18      the branded price.

19          Q. But you don't know that for certain, do you,  
20      sir, from looking at these documents? It's not clear  
21      that the second document is talking about anything more  
22      than Warrick and one other generic. You just don't  
23      know.

24          A. Well, it is the same assumption about 50 and  
25      50, though, 50 percent and 50 percent.



1           Q. That Warrick would have half of the generics'  
2 market share.

3           A. Right, and the last one that you showed me with  
4 that same assumption had two generics in it.

5           Q. Didn't Upsher make essentially the same  
6 forecast; namely, that their A-B generic would be  
7 priced at 50 percent of the price of K-Dur?

8           A. Again, Upsher made a raft of different  
9 forecasts. They've got plenty of forecasts, and I'm  
10 sure that -- I'll take your word for it that there's a  
11 50/50 forecast in there, but there's surely others as  
12 well.

13          Q. And they also forecast 50 percent of the price,  
14 did they not?

15          A. Again, they did a lot of forecasts, and I don't  
16 remember that one particularly.

17          Q. Well, then, let me show it to you, sir.

18          A. That's fine.

19          Q. Let's look at CX 150, Volume 1, tab 13. Aren't  
20 they estimating there that their price would be 50  
21 percent less than K-Dur 20?

22          A. Yes. This is also the forecast that assumes  
23 that K-Dur volume would not be affected very much, if  
24 you look at the third or fourth page of this.

25          Q. Well, actually, sir, they were only talking

1 here about the Upsher share, right; they weren't  
2 talking about other products, like the Warrick -- the  
3 possibility of the Warrick product.

4 A. No, but I'm talking about K-Dur 20. They're  
5 talking about K-Dur 20.

6 Q. Well, in fact, sir, when Upsher did actually  
7 enter, isn't it true that Klor Con M20 took 50 percent  
8 of the sales of K-Dur 20 within three months? Isn't  
9 that true?

10 A. K-Dur's sales fell, plenty of other products'  
11 sales increased. We saw that in the charts that I had  
12 for you on Thursday, and certainly Klor Con M20 --  
13 because K-Dur 10 fell, and Klor Con M10 increased.

14 Q. All right, let's look, Rachel, at CX 1480,  
15 which contains -- I'm sorry, it's Volume 1, tab 5.

16 A. Tab 5.

17 Q. At page 838, and if we can blow up, Rachel, the  
18 middle segment that gives the K-Dur and -- generic  
19 K-Dur 20 and K-Dur 20 numbers. Okay, generic K-Dur 20,  
20 right.

21 A. I'm afraid I can't read what's in these dark  
22 bands, so I don't know what this is.

23 Q. Well, all I'm asking you right now, sir, is to  
24 look at the generic K-Dur 20 and the K-Dur 20 lines,  
25 okay?

1           Now, these are the TRXs, total prescriptions,  
2   from November 2000 to November 2001. Isn't that right?

3           A. Right. I don't -- like I said, I can't read  
4   what's in that band on my copy. Can you read what's in  
5   that document?

6           Q. Well, it's difficult to read, sir, I agree, but  
7   I think you should be able to make out "TRX" on page  
8   838 at the very top. It's hard to read, but that is  
9   what it shows at least on the hard copy.

10          A. Okay, I'll take your word for it.

11          Q. Okay. Now, doesn't that show that K-Dur 20  
12   from November 2000 to June 2001 was averaging in the  
13   range of about 1 million total prescriptions per month?  
14   Is that right?

15          A. Right.

16          Q. And that goes actually through July and August,  
17   and then in September we have generic entry by the  
18   generic K-Dur 20 product, and after three months, the  
19   generic K-Dur 20 had 524,000 prescriptions. Isn't that  
20   right?

21          A. Yeah, I'm just -- I'm afraid I'm just perplexed  
22   by what your "K-Dur Others" line has in there.

23          Q. Actually, I think "K-Dur Others" is the total  
24   of the two generic lines, Doctor.

25          A. I see, okay, okay.

1           Q. But again, we're looking just at the K-Dur 20  
2 line and the generic K-Dur 20 line.

3           A. Right.

4           Q. Okay?

5           A. Um-hum.

6           Q. So, doesn't that show that after three months  
7 of generic entry that the generic K-Dur 20 had achieved  
8 roughly 50 percent of the prescriptions of -- that --  
9 strike that, let me rephrase it.

10                   Doesn't that show that after three months, that  
11 the generic K-Dur 20 had achieved about 50 percent of  
12 the true generic entry share?

13           A. Are you finished the question?

14           Q. Yeah.

15           A. Okay, yes, and that K-Dur -- generic K-Dur 10  
16 got even more of K-Dur 10's sales.

17           Q. Well, we're talking about K-Dur 20, Doctor,  
18 okay?

19           A. Sure, right.

20           Q. And didn't Mr. Coleman testify that the Klor  
21 Con M20 came in at a transaction price of 50 percent of  
22 the price of K-Dur 20?

23           A. I don't recall that testimony.

24                   MR. NIELDS: Your Honor, what -- can we get a  
25 clarification as to whose testimony you're referring

1 to?

2 MR. ORLANS: Surely, and actually I am going to  
3 refer to it. I am going to pull it up.

4 MR. NIELDS: I don't recall a Mr. --

5 MR. ORLANS: It's in Volume 2 -- and I  
6 misspoke, it was not testimony. It was a deposition  
7 that we've used that is in evidence. So, let me refer  
8 you to that as soon as I pull the document. It's in  
9 Volume 2, tab 2.

10 JUDGE CHAPPELL: So, your objection, which  
11 sounded like improper foundation, is that withdrawn  
12 pending his --

13 MR. NIELDS: Yes, it is, Your Honor, exactly  
14 right.

15 BY MR. ORLANS:

16 Q. And it's CX 1490.

17 A. This is in Volume 2?

18 Q. Yes, CX 1490, the deposition testimony of Bob  
19 Coleman.

20 Who is Mr. Coleman by the way, sir, do you  
21 know?

22 A. You know, I don't recall.

23 Q. Wasn't Mr. Coleman the -- and let me direct you  
24 first to page 8 and page 9. Wasn't Mr. Coleman the  
25 director of marketing who was responsible for the

1 overall management of the brands, and in particular, on  
2 page 9, was responsible for the management of Klor Con  
3 M20 to bring it to the commercial state and launch the  
4 product successfully, correct?

5 A. Yes, I see that.

6 Q. Okay. Now, at page 26, sir, and following on  
7 to page 27, but beginning at page 26, Mr. Coleman was  
8 asked to compare the transaction price for  
9 Upsher-Smith's Klor Con M20 to the price of K-Dur 20.  
10 Do you see that? That's beginning at line 13 on page  
11 26.

12 And then on page 27 at line 4, he concludes  
13 that the Klor Con M20 was approximately 50 percent  
14 less. Isn't that correct, sir?

15 MR. SCHILDKRAUT: Objection. He says he does  
16 not know specifically.

17 BY MR. ORLANS:

18 Q. Well, let me read the testimony, because I  
19 think it's pretty clear what he was saying.

20 "QUESTION: Do you know what Upsher-Smith's  
21 transaction price for a 100-count bottle of Klor Con  
22 M20 is?

23 "ANSWER: It's probably close to \$24.

24 "QUESTION: How far below the price of K-Dur 20  
25 is Upsher-Smith's price for Klor Con M20?"

1           Then there were some objections, and then the  
2 answer was:

3           "ANSWER: I don't know specifically.

4           "QUESTION: Do you know generally?"

5           Again, objections.

6           "ANSWER: It is -- it's approximately 50  
7 percent less."

8           Do you see that, sir?

9           A. Yes.

10          Q. Okay. Do you have any reason to doubt that  
11 testimony?

12          A. Well, Mr. Dritsas certainly testified that what  
13 he thought the pricing of K-Dur 20 was turned out to be  
14 a lot higher than K-Dur 20's actually pricing. So, I  
15 just don't know, based on this testimony, how to  
16 reconcile this testimony with what Mr. Dritsas  
17 testified to at the trial here. So -- and he certainly  
18 does say initially that he doesn't know, so...

19          Q. Doesn't he go on -- as long as we're on this  
20 testimony, sir, let me read you and see whether you  
21 agree with or took into account the testimony beginning  
22 at page 27, line 6.

23           "QUESTION: How did the marketing department  
24 decide on the price of Klor Con M20?"

25           And then at page (sic) 12 he answers:

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1           "ANSWER: In terms of entering a market with a  
2 generic product or an approved generic product, the  
3 marketplace usually expects a discount between 40 and  
4 60 percent from the innovator price. And in order to  
5 secure a strong and deep acceptance to the product, you  
6 have to price it in that area. So based on that we set  
7 our price at approximately 50 percent off the innovator  
8 in the market at that time."

9           MR. SCHILDKRAUT: I think Mr. Orlans said at  
10 page 12, did you mean at page 27?

11           MR. ORLANS: I did, I apologize. I meant line  
12 12, page 27.

13           BY MR. ORLANS:

14           Q. Do you see that testimony, sir?

15           A. Yes, I do.

16           Q. Okay. Do you agree with it?

17           A. Well, I assume that's the basis for his 50  
18 percent assessment.

19           Q. Do you agree with the concept that generics are  
20 typically priced between 40 and 60 percent of the  
21 innovator's price? Isn't that what you've seen?

22           A. Yeah, I don't -- I don't know that that's a  
23 hard and fast rule. I mean, I assume that many of them  
24 would be in that range, but I couldn't tell you more --  
25 if there are products that are priced outside that



1 range. There could well be. I haven't looked.

2 Q. You don't know if initially, when A-B generics  
3 come on the market, you don't know if that's not sort  
4 of generally considered the range at which those  
5 products are priced?

6 A. I just have not done a comprehensive enough  
7 look to be able to answer one way or the other.

8 Q. Okay. We've talked for the most part, Doctor,  
9 about K-Dur 20's sales, but to the extent that one  
10 looks at total K-Dur sales, including both K-Dur 20 and  
11 K-Dur 10, isn't it true that prior to generic entry,  
12 over 90 percent of the total K-Dur sales revenues were  
13 attributable to K-Dur 20?

14 A. I think the number has been around 90 percent,  
15 but the interesting thing is it stayed constant. So,  
16 both products are growing. Ten is growing as well as  
17 20.

18 Q. And about 85 percent of the total K-Dur  
19 prescriptions were attributable to K-Dur 20. Isn't  
20 that correct?

21 A. That sounds about right, but I don't recall the  
22 exact numbers.

23 Q. Okay. Other than yourself, sir, are you aware  
24 of any other expert for the respondents who -- whose  
25 material you reviewed and who's offered the definitive

1 opinion that there's no market power here, no monopoly  
2 power?

3 A. Is your question am I aware of any other expert  
4 for Schering-Plough or Upsher-Smith?

5 Q. Schering or Upsher.

6 A. That's opined about monopoly power?

7 Q. Right.

8 A. I'm not aware of any. I just don't recall any.

9 Q. Okay. Now, you believe that a market  
10 consisting of K-Dur 20 and any A-B generics to that  
11 product would be too narrow a market. Is that correct?

12 A. That's correct.

13 Q. As an expert antitrust economist testifying in  
14 the area of prescription drugs, are you generally  
15 familiar with recent enforcement, government  
16 enforcement activities in the area of generics?

17 A. Oh, I have some general familiarity.

18 Q. Well, let me ask you particularly, are you  
19 familiar with the 1998 case that the Commission brought  
20 against Mylan Laboratories?

21 A. I don't recall the specifics of it, no.

22 Q. You don't recall.

23 Do you know whether that case involved charges  
24 of monopolization and restraint of trade in connection  
25 with two generic products?

1           A. I don't remember the details.

2           Q. Would it surprise you, sir, to know that the  
3 two generic drugs that were at issue there were alleged  
4 to be a market, that among the markets alleged, that  
5 is, were the A-B generic drugs lorazepam and  
6 clorazepate?

7           A. Is your question would that surprise me?

8           Q. Would that surprise you?

9           A. Well, given that I don't recall the details,  
10 no, it wouldn't surprise me.

11          Q. So, the markets as I've described them alleged  
12 in the Mylan case were actually narrower than the  
13 markets we're talking about here, correct? That is,  
14 narrower than a market of the branded drug and the A-B  
15 generic.

16          A. I don't know, because --

17               MR. GIDLEY: Object to the form, Your Honor,  
18 both on foundation and compound.

19               MR. ORLANS: I'll rephrase it, Your Honor.

20               JUDGE CHAPPELL: Thank you.

21               BY MR. ORLANS:

22          Q. A market of just an A-B generic is a narrower  
23 market than the brand and the A-B generic, correct,  
24 sir?

25          A. It's got fewer products, so it is narrower.

1           Q. Okay. Isn't it true, sir, that your consulting  
2           firm, NERA, sought to be the state's expert on damages  
3           in the Mylan case?

4           A. I don't know the answer to that question.

5           Q. Do you know Richard Rozek, Todd Morrison and  
6           David Monk?

7           A. Were experts in that case?

8           Q. Do you know them?

9           A. Oh, do I know them? Yes, I do.

10          Q. And they all work at NERA, do they not?

11          A. As far as I know, yes.

12          Q. And do you know whether these three individuals  
13          met with the states and with a Commission attorney in  
14          December of 1998 specifically to seek employment in the  
15          Mylan case as the state's expert on damages?

16          A. I have no knowledge of that.

17          Q. Would it surprise you, sir, if that were the  
18          case?

19          A. I don't know anything about the case, so -- I  
20          know too little to be surprised one way or the other.

21          Q. Okay. So, it wouldn't surprise you if your  
22          consulting firm was prepared to support a market  
23          considerably narrower than the one at issue here, would  
24          it?

25          A. I would certainly expect that any colleague of

1 mine would only come to a conclusion about relevant  
2 markets after looking at all the facts.

3 Q. Does the fact, sir, that two products are used  
4 for the same purpose necessarily mean that they're in  
5 the same relevant market?

6 MR. GIDLEY: Object to the form, calls for a  
7 legal conclusion.

8 MR. ORLANS: I'm asking it only as an economic  
9 proposition.

10 JUDGE CHAPPELL: Overruled with that  
11 qualification.

12 THE WITNESS: Speaking as an economist, the  
13 fact that two products are used for the same purpose  
14 does not necessarily put them in the same market.

15 BY MR. ORLANS:

16 Q. So, for example, an automobile and a motorcycle  
17 both provide transportation, but that doesn't mean  
18 they're in the same market, correct?

19 A. It doesn't mean they aren't for some purposes.  
20 I just don't know one way or the other.

21 Q. Okay. But again, the mere fact that products  
22 are used for the same purpose doesn't necessarily mean  
23 they're in the same market, right?

24 A. If that's any different from the last question  
25 that I just answered yes, I don't know how to answer

1 it, but otherwise, yes.

2 Q. Isn't it true, sir, that Upsher has referred to  
3 a 20 mEq pill market in which prior to September of  
4 2001 K-Dur 20 had 100 percent of the sales?

5 A. Upsher in its documents has referred to all  
6 sorts of things as markets, 8 milliequivalent, 10  
7 milliequivalent capsules, wax matrix tablets. Upsher  
8 uses the word "market" fairly liberally.

9 Q. All right, now could you answer my question?

10 Isn't it true, sir, that Upsher has referred to  
11 a 20 mEq pill market in which prior to September 2001  
12 K-Dur 20 had 100 percent of the share?

13 A. They may well have. I don't know.

14 Q. Well, let me see if I can't illuminate you  
15 since you're not clear. Let me ask you to turn to  
16 CX 19, which is in Volume 1, tab 14, and Rachel, could  
17 we pull up page 247.

18 A. Did you say tab 14?

19 Q. Yes. And in fact, on this page, doesn't it  
20 show just the K-Dur market --

21 A. What page are you on?

22 Q. I'm on page 247.

23 A. 247.

24 Q. Doesn't that page, sir -- let me rephrase the  
25 question so you will have it in front of you.

1           Doesn't that page show a market for K-Dur 20  
2   only in which K-Dur 20 has 100 percent of the shares?

3           A. It shows sales for K-Dur 20, and there's a  
4   title at the top that says "K-Dur Market."

5           Q. Right, and the market share is listed as 100  
6   percent, correct?

7           A. Yes.

8           Q. Okay, let me also ask you to turn to CX 150,  
9   which is Volume 1, tab 13 at page 538, and doesn't that  
10   Upsher document show a 20 mEq market in which K-Dur had  
11   100 percent of the sales until the entry of or the  
12   projected entry of Klor Con M20? Page -- Rachel, this  
13   is page 538.

14          A. Yes, but with the --

15          Q. I didn't ask for an explanation, Doctor.  
16   That's what it shows, isn't it?

17          A. I'm trying to find what you're talking about.  
18   Where is the 100 percent?

19          Q. Page 538.

20          A. Yes.

21          Q. And there's a 20 mEq market share percent. Do  
22   you see that?

23          A. Oh, right, right, okay.

24          Q. Okay?

25          A. I see it.

1           Q. And it shows K-Dur 20 with 100 percent of the  
2           sales at least until the projected entry of Klor Con  
3           M20, correct?

4           A. Yes.

5           Q. Okay. Didn't Upsher view its lack of a 20 mEq  
6           pill to compete with K-Dur 20 as a weakness?

7           A. It definitely viewed a 20 mEq pill as something  
8           that would enable it to compete even more with -- with  
9           Schering-Plough.

10          Q. Did it view the lack of a 20 mEq product as a  
11          weakness?

12          A. There may have been words to that effect in one  
13          of the documents.

14          Q. Okay. From 1996 to 2000, Schering increased  
15          the price of K-Dur 20 each year, didn't it?

16                 MR. GIDLEY: Objection, vague. What do you  
17          mean by "price"?

18                 THE WITNESS: If I remember the --

19                 JUDGE CHAPPELL: Hang on, sir, we have an  
20          objection pending.

21                 THE WITNESS: I beg your pardon, sir.

22                 JUDGE CHAPPELL: Do you want to clarify or  
23          stand on that question, Mr. Orlans?

24                 MR. ORLANS: I'll stand on the question, sir.

25                 JUDGE CHAPPELL: Do you understand the



1 question?

2 THE WITNESS: I do have a question as to  
3 exactly what is meant by "price."

4 JUDGE CHAPPELL: Objection sustained.

5 BY MR. ORLANS:

6 Q. According to IMS data, which you yourself  
7 included in one of your demonstratives that's titled  
8 K-Dur 20 did not enjoy a price premium, which is found  
9 at your tab 40, isn't it true that K-Dur 20 prices were  
10 increased each year from 1996 to 2000?

11 A. I think the IMS data do show prices that are  
12 going up each year.

13 Q. Okay. And isn't it also true that the total  
14 number of prescriptions for K-Dur 20 went up each year  
15 as well?

16 A. I think that's right.

17 Q. So, it would be fair to say that the price  
18 increases didn't adversely affect the sales of K-Dur  
19 20, correct?

20 A. No, it wouldn't be fair to say that.

21 Q. The sales of K-Dur 20 continued to increase  
22 notwithstanding the price increases, correct?

23 A. That would be correct.

24 Q. Okay. I heard you testify on Thursday that  
25 K-Dur 20 was losing share to non-A-B rated generics.

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1 Is that what you meant to say, sir?

2 A. That Schering viewed the non-A-B rated generics  
3 as taking share away from them, that's correct.

4 Q. But in fact, sir, didn't K-Dur 20 continue to  
5 gain share of total prescriptions from '94 to '99?

6 A. Not at the expense of A-B rated generics, but  
7 share did go up.

8 Q. Share did go up?

9 A. But not at the expense of A-B rated generics.

10 Q. So, during this period, others weren't taking  
11 share from K-Dur 20, were they? K-Dur 20 was taking  
12 share from others.

13 A. That's correct.

14 Q. Schering promoted K-Dur 20 as having advantages  
15 over other potassium chloride products. Isn't that  
16 right?

17 A. That was among the ways in which it was  
18 promoted, yes.

19 Q. And prior to the entry of an A-B generic, isn't  
20 it true that Schering was primarily concerned about the  
21 non-A-B generics?

22 A. Well, as far as being concerned about generics  
23 was concerned, so to speak, yes, it would have been the  
24 non-A-B generics, because there were no A-B generics,  
25 but they were also concerned about the other products

1 in the market.

2 Q. Well, I thought we had a discussion earlier  
3 today, sir, about how the generics were the only other  
4 growing segment in addition to K-Dur 20, and you just  
5 pointed to me a document that talked about how Schering  
6 was concerned about losing share to non-A-B generics.  
7 Is it fair to say that Schering was primarily concerned  
8 with the generic competition?

9 A. They were more concerned about generic  
10 competition, because that's what was growing, but they  
11 were certainly concerned about everything else as well,  
12 and there are other brands that get specific mention in  
13 Schering's documents.

14 Q. But they were more concerned about the generic  
15 competition, weren't they?

16 A. Based on what the documents say, you see  
17 more -- more references to generics, but you also see  
18 references to the other brands as well.

19 Q. Now, your demonstrative -- let's go to your  
20 demonstrative again, which I still have on the ELMO,  
21 that K-Dur 20 did not enjoy a price premium. Do you  
22 see that?

23 A. Yes.

24 Q. Okay. And in terms of that demonstrative, both  
25 Micro-K and K-Tab are branded products, are they not?

1           A. Yes.

2           Q. And in fact, these two products, that is,  
3   Micro-K and K-Tab, have a rather minor market presence.  
4   Isn't that also true?

5           A. Well, they're certainly smaller than K-Dur 20,  
6   but I don't think they're that much smaller than K-Dur  
7   10. I think they are comparable to K-Dur 10. It  
8   depends on which year you look at I think.

9           Q. In fact, sir, if you turn to your expert  
10   report, Exhibits 3-A and 3-B, doesn't that show that --  
11   well, let me let you get there first.

12          A. Yes, just a minute.

13          Q. Do you have it?

14          A. I do.

15          Q. Okay. Doesn't that show that K-Tab and Micro-K  
16   have a minor market presence?

17          A. Well, 3-A shows that Micro-K is at 10 percent  
18   in '95, a little more than 10 percent in '95 of total  
19   prescriptions. K-Tab is down below 5 percent, if I  
20   read this right, and I think that K-Dur 10 was probably  
21   less than 10 percent at this time.

22          Q. Well, let me ask you to look, sir, at Exhibits  
23   7-A and 7-B, which go from '96 to 2000, and I don't see  
24   K-Tab on those graphs, but Micro-K certainly is pretty  
25   much in freefall down to virtually insignificance,

1     isn't it, sir?

2           A. Well, at -- in '96, it's over 5 percent. In  
3     '97, it's somewhat under 5 percent -- you know,  
4     actually, I've got to tell you, I can't really tell,  
5     because they don't have any colors on this, and --

6           Q. Well, it looks like it sort of merges with the  
7     little block at the bottom, so it's going down from  
8     just over 5 percent in '96 to what looks like only a  
9     couple percent at most in 2000. Isn't that right?

10          A. Yes, you've got 8, which is starting out around  
11     2 and a half percent and remains maybe close there to  
12     about 2 percent, and you've got 10, which starts out  
13     over 5 and comes in around 2.

14          Q. All right, let me ask you this, sir: Going  
15     back to your price premium chart, the generics on your  
16     chart are Ethex 10 and the two Klor Con products, which  
17     are sort of essentially branded generics. Isn't that  
18     right?

19          A. No, Ethex is a -- well, it has brand, it has an  
20     A-B rating.

21          Q. Ethex is a generic, though.

22          A. It's a generic, but it's an A-B rated generic  
23     to Micro-K.

24          Q. I understand, but it is a generic product.

25          A. It is a generic.

1 Q. And Klor Con 8 and 10 are essentially generic  
2 products, too. Isn't that right?

3 A. Well, they are not generics in the same way.  
4 They are B-C rated generics, not A-B rated generics.

5 Q. Right, but they are essentially branded  
6 generics, right?

7 A. I've heard that word used.

8 Q. And if you're looking at Klor Con 8 and 10 and  
9 Ethex 10, which are the generics on this chart, isn't  
10 it true that those products are about 3 -- one-third  
11 the price, one-half to one-third of the price of K-Dur  
12 20?

13 A. One-half to one-third, that's about right.

14 Q. Okay. At the beginning of this trial, sir, I  
15 don't know if you were here, but Mr. Curran took two  
16 Klor Con 10 pills and compared them to a K-Dur 20  
17 tablet which he broke in half. I don't know whether  
18 you saw that demonstration or not, but isn't it true,  
19 sir, that the K-Dur tablet, the K-Dur 20 tablet, is two  
20 to three times more expensive than those two Klor Con  
21 tablets?

22 MR. GIDLEY: Objection. Objection, Your Honor,  
23 vague as to time frame.

24 MR. ORLANS: I'll take it anywhere from 1996 to  
25 2000 given the data in front of you, Doctor.

1 JUDGE CHAPPELL: Withdrawn?

2 MR. GIDLEY: With that caveat, yes.

3 THE WITNESS: Okay, as I'm not sure exactly  
4 what Klor Con tablets Mr. Curran compared to the broken  
5 K-Dur, it's certainly correct that the Klor Con 10s  
6 were in that approximate relationship to K-Dur 20 over  
7 this time frame.

8 BY MR. ORLANS:

9 Q. And it was Klor Con 10, just so the record is  
10 clear on that, Doctor.

11 A. Okay.

12 Q. Okay? You would agree, wouldn't you, that a  
13 200 to 300 percent premium is a considerable premium to  
14 pay?

15 A. I don't know what context you mean it in.

16 Q. Wouldn't you view that as a substantial premium  
17 paid by consumers, 200 to 300 percent?

18 A. For the same thing?

19 Q. For the --

20 A. Well, I'm afraid I don't understand your  
21 question. Are you talking about --

22 Q. I'm just asking you to compare the two  
23 products, Doctor. You tell me or I understood you to  
24 say that these products were substitutable one for the  
25 other, and what I'm trying to point out here is that

1       notwithstanding such alleged substitution that, in  
2       fact, K-Dur is two to three times more expensive than a  
3       comparable 20 mEq dose of Klor Con 10.

4           A.   Yes, in exactly the way that a Micro-K is twice  
5       as expensive as its A-B rated -- as its A-B rated  
6       generic, Ethex 10.   Yes, the generics are cheaper.

7           JUDGE CHAPPELL:   Mr. Orlans, it's after 12:00.  
8       Let's take a short recess until 12:15.

9           MR. ORLANS:   Surely, Your Honor.

10          (A brief recess was taken.)

11          JUDGE CHAPPELL:   Mr. Orlans, you may continue.

12          MR. ORLANS:   Thank you, Your Honor.

13          BY MR. ORLANS:

14          Q.   Dr. Addanki, you've testified that all  
15       potassium chloride supplements are competitors of K-Dur  
16       20, correct?

17          A.   Right, that they're all in the market, yes.

18          Q.   Isn't it true, sir, that all products, all  
19       potassium chloride supplements, aren't equally close  
20       substitutes for K-Dur 20 in terms of constraining, for  
21       example, K-Dur's -- K-Dur 20's pricing?

22          A.   That's probably true.

23          Q.   Okay.   And in fact, the A-B generic imposes a  
24       greater constraint, doesn't it?

25          A.   In a sense, the A-B generic imposes no



1 constraint at all on pricing, because that's not the  
2 way those two products co-exist in the marketplace,  
3 because they don't -- a prescription written for the  
4 branded gets filled with the A-B. So, in some sense,  
5 it's not clear to me at all that I would view that as a  
6 price-constraining factor.

7 Q. Well, a sales-constraining factor, right?

8 A. Well, what it does is it interferes with  
9 your -- it blocks your ability to realize any returns  
10 to branding efforts.

11 Q. Well, it also brings down the average price in  
12 a way that no other product could. Isn't that right?

13 MR. SCHILDKRAUT: Objection, Your Honor. I  
14 don't know if we're talking about quality-adjusted  
15 prices here or nominal prices.

16 MR. ORLANS: We're just talking about average  
17 prices.

18 MR. SCHILDKRAUT: Nominal prices, that's fine.

19 THE WITNESS: Yeah, I -- I just don't know that  
20 that follows necessarily.

21 BY MR. ORLANS:

22 Q. You don't agree that the A-B rated generic  
23 brings down the average prices in a way that no other  
24 product could?

25 A. Well, what average price are you talking about?

1           Q. The average prices of K-Dur and any K-Dur  
2       substitutes -- strike that.

3           Well, let's define the market as K-Dur and its  
4       A-B rated generic. In that market, obviously the A-B  
5       rated generic brings down prices in a way that no other  
6       product could, right?

7           A. Well, that's trivial, right, because there is  
8       no other product.

9           Q. But in terms of the impact on sales, the A-B  
10      rated generic limits the quantity that the brand can  
11      sell in a way that no other product could. Isn't that  
12      right?

13          A. Well, the A-B rated generic -- see, I don't  
14      agree that no other product could, but certainly the  
15      A-B rated generic is the only product that can be  
16      dispensed and very frequently has to be dispensed,  
17      depending on mandatory substitution laws, for a  
18      prescription written for the branded pharmaceutical.

19          Q. So, the A-B rated generic is not just a closer  
20      substitute for the brand but also the substitute that  
21      would be dispensed and in some instances must be  
22      dispensed in filling a prescription, correct?

23          MR. SCHILDKRAUT: Objection. The start of the  
24      question, "not only a closer substitute," I don't think  
25      Dr. Addanki ever testified to that.

1 MR. ORLANS: Actually, I asked the question. I  
2 didn't say he ever testified to it.

3 BY MR. ORLANS:

4 Q. The question was, sir, isn't it true that the  
5 A-B rated generic is not just a closer substitute for  
6 the brand but also the substitute that would be  
7 dispensed, in many instances must be dispensed, in  
8 filling a prescription for the brand? Do you agree  
9 with that?

10 MR. SCHILDKRAUT: Objection, compound question.

11 JUDGE CHAPPELL: I'll overrule it and have  
12 Susanne read it aloud, repeat the question. Answer if  
13 you understand it, sir.

14 THE WITNESS: Thank you, sir.

15 (The record was read as follows:)

16 "QUESTION: The question was, sir, isn't it  
17 true that the A-B rated generic is not just a closer  
18 substitute for the brand, but also the substitute that  
19 would be dispensed, in many instances must be  
20 dispensed, in filling a prescription for the brand? Do  
21 you agree with that?"

22 THE WITNESS: I can't answer that question yes  
23 or no, but I can answer the question that's been asked.

24 BY MR. ORLANS:

25 Q. Well, the question was a yes or no question.

1           A. I'm aware of that. I'm aware of that, and the  
2 problem is that the first part of the question and the  
3 second part of the question have different answers.

4           Q. Well, that's fine, Doctor, if the answer is you  
5 can't agree with that statement, I have no problem with  
6 that answer.

7           Let me point you to your deposition testimony.  
8 You and I had a discussion -- and you were deposed on  
9 February 21st, 2002. Do you remember that?

10          A. Yes.

11          Q. And at page 214 of that deposition, you and I  
12 were discussing -- around line 6 of page 214, we were  
13 discussing --

14          A. Could you --

15          Q. -- Ethex --

16          A. -- could you focus that a little better?

17          Q. Surely, let me bring it in a little bit.

18 Whoops, wrong way.

19                 We were discussing Ethex, which is the A-B  
20 rated generic to Micro-K. Isn't that right?

21          A. That's -- that's my recollection.

22          Q. That's what we were discussing.

23          A. Right.

24          Q. And in that context, we were talking about the  
25 effects that one would have on the other, and I said:

1           "QUESTION: And therefore a closer substitute  
2 for it?

3           "ANSWER: Not just a closer substitute, but the  
4 substitute that would be dispensed, in many states had  
5 to be dispensed in some sense, could be dispensed by  
6 the pharmacist in filling a Micro-K prescription."

7           Isn't that your answer, sir?

8           A. Well, I'll tell you, I don't recall saying "not  
9 just," and I haven't read my transcript yet, so I don't  
10 know what mistakes there are in that deposition, but my  
11 answer is in some states would be dispensed and in some  
12 states must be dispensed.

13          Q. So, are you suggesting, sir, that the  
14 transcript is incorrect, or is that your position?

15          A. I haven't reviewed the transcript, Your Honor,  
16 and it certainly doesn't sound to me that my answer had  
17 as much to do with the first part as it does the second  
18 part of that concept.

19          Q. But you haven't reviewed the transcript up  
20 until this point?

21          A. I have not reviewed the transcript.

22          Q. The reason, by the way, that the product has to  
23 be dispensed in some states is because the Government  
24 views the A-B generic as a perfect substitute for the  
25 brand. Is that right?

1           A. There are mandatory substitution laws. I don't  
2 know what you mean by "the Government views" in this  
3 context.

4           Q. Well, isn't that what the mandatory  
5 substitution law says, essentially, that it's a perfect  
6 substitute and therefore it must be dispensed?

7           MR. SCHILDKRAUT: Objection, calls for a legal  
8 opinion.

9           MR. GIDLEY: Same objection.

10          MR. ORLANS: I'm asking for his economic sense  
11 of that, if he knows.

12          JUDGE CHAPPELL: I'll overrule it with that  
13 qualification.

14          THE WITNESS: As an economist, I don't think  
15 you can draw any such conclusion. I mean, there is a  
16 mandatory substitution law, but I don't think you can  
17 infer from that that the Government, whatever you mean  
18 by that, has any view about the economic  
19 substitutability or the perfect economic  
20 substitutability of one product for another.

21          BY MR. ORLANS:

22          Q. In your opinion, sir, if there had been no  
23 entry of Klor Con M20, would K-Dur sales, K-Dur 20's  
24 sales, have fallen the way they did?

25          A. What are you assuming about K-Dur's promotion?

1           Q. I'm assuming that things continued as they were  
2           and the only difference was the entry of K-Dur -- of  
3           Klor Con M20.

4           MR. SCHILDKRAUT: Objection, now it's  
5           ambiguous.

6           JUDGE CHAPPELL: I'll leave that up to the  
7           witness. Overruled.

8           THE WITNESS: Your Honor, the reason I asked  
9           the question is because the entry of the Klor Con  
10          product or the A-B rated generic affects the incentives  
11          to promote, and there was a lot of promotion going on  
12          with K-Dur 20, and so my question is, is your  
13          hypothetical world one where K-Dur 20 would continue to  
14          be promoted at historical levels or not?

15          BY MR. ORLANS:

16          Q. All right, let me respond to that, Doctor, and  
17          let's assume that the comparison is with K-Dur 20  
18          continuing to be sold, promoted, just as it had been  
19          absent generic entry on the one hand, versus entry of  
20          an A-B generic on the other hand, okay?

21          Now, on those facts, is it your position that  
22          if there had been no entry of Klor Con M20, that K-Dur  
23          20's sales would have fallen like this?

24          A. In the way that they actually did?

25          Q. In the way they actually did.

1           A. No, I think K-Dur 20's sales would not have  
2           fallen in the way they actually did.

3           Q. And in fact, wouldn't it be your opinion that  
4           they would have continued to grow as they had been?

5           A. Until when? I mean, I haven't looked into what  
6           the future growth of this product would be, but  
7           certainly in the months for which we have observed  
8           data, I would agree that they would not have fallen the  
9           way they did.

10          Q. When Upsher was deciding how to price Klor Con  
11          M20, isn't it true that they focused only on the price  
12          of K-Dur 20?

13          A. I don't know that that's a fact one way or the  
14          other.

15          Q. Let me ask you, sir, to turn to Volume 2, tab  
16          2, which is again the testimony of Mr. Coleman.  
17          Rachel, if you could bring that up, that's CX 1490 at  
18          page 27, line 22 -- actually, line 25, to page 28, line  
19          11, and this was again Mr. Coleman's testimony -- can  
20          we focus that in a little bit, Rachel? I'm looking for  
21          page 27, line 22. Good, okay.

22                 And again, Mr. Coleman was the marketing person  
23          in charge of bringing Klor Con M20 to market, correct,  
24          sir?

25          A. That's my understanding, yes.



1 Q. Okay. And didn't he testify as follows:

2 "QUESTION: Did Upsher-Smith take any other  
3 products into account in deciding on the price for Klor  
4 Con M20?"

5 And then there were some objections.

6 "ANSWER: Could you be more clear?

7 "QUESTION: Did Upsher-Smith take into account  
8 any other potassium chloride products when it was  
9 deciding what price it would enter the market for the  
10 September 1, 2001 launch?

11 "ANSWER: No."

12 Wasn't that his testimony, sir?

13 A. That's what it -- that's certainly what this  
14 record says.

15 Q. Okay. You've used the merger guidelines in  
16 some of your work, haven't you, Dr. Addanki?

17 Rachel, you can take that off.

18 A. I have.

19 Q. And there's a section in the guidelines that  
20 focuses on the unilateral effects and in particular the  
21 concept of the closest competitors in a differentiated  
22 market space. Isn't that correct?

23 A. There is such a section, yes.

24 Q. Okay. And what that section says is that a  
25 merger of the two closest competitors can create market

1 power even though there are other competitors in the  
2 market, correct?

3 A. Yeah, I'm not sure of the exact wording, but  
4 it's something to that effect.

5 Q. Okay. And the reason for this is that a price  
6 increase that wouldn't have been profitable prior to  
7 the merger may now be profitable because some of the  
8 sales that would otherwise have been lost will be  
9 diverted to the substitute product, correct?

10 A. That's correct.

11 Q. In your direct examination, you talked about  
12 how a big share of the market might be suggestive of  
13 the existence of monopoly power. Do you recall that?

14 A. It would certainly lead you to ask the question  
15 whether there was any.

16 Q. And a big share would be 60 or 65 percent. Is  
17 that fair?

18 A. You'd start looking certainly at that range.

19 Q. Okay, okay. Let's say I accept for sake of  
20 argument and for purposes of this question your market  
21 definition of all potassium chloride products. Isn't  
22 it true that as a percentage of sales revenues, K-Dur  
23 20 had 60 to 65 percent of that market from 1998 to  
24 2000?

25 A. Those -- you know, I don't recall the exact

1 numbers, but that's probably not far off.

2 Q. Would you like to go through the numbers,  
3 Doctor?

4 A. Sure.

5 Q. Let's do that. Let me have you turn to Volume  
6 1, tab 3, which is CX 34, and the first page I want,  
7 Rachel, is page 644. I'm looking, Rachel, at the K-Dur  
8 lines there. Can you pull that up? It's -- yeah.  
9 Unfortunately, some of it is still going to be  
10 difficult to read, but if you take the -- marking down  
11 through all the 20 mEq products, all the way down  
12 there, just the 20s and drop out the 10s, though.

13 Okay, Doctor, unfortunately this one, too, is  
14 going to be a little bit hard to read, but maybe we can  
15 get there just by adding up the 40.3, the 11.1, the  
16 2 -- the 9.1 and the 2.3, and we come up with a 1998  
17 number of about -- just slightly over 60 percent. Is  
18 that right?

19 A. Yeah, that sounds about right.

20 Q. Okay. And let me ask you to turn to page 652,  
21 and again, Rachel, if you could do the same thing and  
22 mark only the 20s, please, and blow them up a little  
23 bit. Great.

24 Okay, and similarly here, Doctor, if you add  
25 the 42 percent -- might be 42.9 percent, actually,

1 the -- I can't tell if that's 8.8 or 9.8, but 9.8, 8.9  
2 and 2.4, and you get a number somewhere around 63, is  
3 that right, or 64?

4 A. In that range.

5 Q. Okay. And also on that page, if you look at  
6 the 2000 figures and you add up the 45.4, the 10.2, the  
7 8.4 and the 2.8, you get a number of about 65 percent,  
8 correct?

9 A. Yep, that's what these numbers are saying.

10 Q. Okay. Let's talk a little bit about  
11 substitution and switching, Doctor. I think we've  
12 heard from your prior testimony that a pharmacist can  
13 automatically substitute an A-B generic and in many  
14 states is required to do so. Is that right?

15 A. That's correct.

16 Q. On the other hand, substitution from K-Dur 20  
17 to another potassium chloride supplement, that is, a  
18 non-A-B rated generic, could occur only if the doctor  
19 was contacted and agreed, right?

20 A. Or if the doctor wrote a different  
21 prescription. I mean, there's competition at different  
22 levels of the market.

23 Q. Okay. In your testimony on Thursday, you  
24 talked a bit about switching and switching costs. Do  
25 you recall that?

1           A. I recall that we talked about that, yes.

2           Q. And you testified that lots of times  
3 pharmacists will call doctors to ask them to substitute  
4 something else for K-Dur 20. Do you recall that?

5           A. I testified that I was aware that there had  
6 been testimony in the record here to that effect.

7           Q. And you believe that the amount of switching  
8 demonstrates that there's significant competition  
9 between the various forms of potassium chloride,  
10 correct?

11          A. I was responding to a concern raised by Dr.  
12 Bresnahan that there could be switching costs that  
13 would impede substitutability among products, and in  
14 responding to that, I had said that, well, first,  
15 switching cost doesn't mean there's no  
16 substitutability, doesn't mean the products don't  
17 compete, because there's competition at the  
18 prescription level as well, but second, that as an  
19 empirical matter in this case, it seemed that there was  
20 therapeutic substitution going on at the pharmacy level  
21 with phone calls to the physician and so on.

22          Q. Okay. In reaching that conclusion, you said  
23 you relied on testimony, sir. Did you consider any  
24 empirical evidence on the amount of switching that  
25 occurs?

1           A. Yes, I believe that the success of Klor Con in  
2     the marketplace is testimony to exactly that fact,  
3     because the growth of Klor Con has been achieved  
4     largely by therapeutic substitution either at the  
5     prescribing level or at the pharmacy level.

6           Q. Did you look, sir, at any empirical evidence  
7     that specifically -- strike that, let me ask it this  
8     way:

9                     Isn't it true, sir, that Schering purchased  
10    substitution data from IMS for potassium chloride  
11    products?

12          A. I don't recall. I may have --

13          Q. So, you didn't review those data, then, did  
14    you?

15          A. Well, I just don't recall if I did or not.

16          Q. You don't recall. Well, maybe we'll take a  
17    look at that, sir. Can we go, Rachel, to CX 43.

18          A. Is that a tab in this binder?

19          Q. No, I'm sorry, sir, it isn't. Can you read the  
20    screen? Can we blow it up a little bit, Rachel? I'm  
21    interested in the first column -- the first few rows,  
22    which are K-Dur, Key Pharmaceuticals tabs, and then  
23    there's 10, and right under that is 20, and I'm  
24    interested in the 20.

25                 Okay, now, sir, we're looking at the IMS

1     prescription audit data, are we not, for substitution,  
2     actual prescription audit?

3           A. I'm afraid that this does not look familiar to  
4     me, and certainly I don't recognize it from the numbers  
5     that are up on the screen.

6           Q. Let me --

7                   Your Honor, may I approach? I'll give the  
8     witness my copy.

9                   JUDGE CHAPPELL: Yes, you may.

10                  BY MR. ORLANS:

11                 Q. And again, for the record, this is CX 43 that  
12     we're looking at.

13                         Now, the first page has data year to date,  
14     December 1996. Is that correct, sir?

15                 A. That's what it says.

16                 Q. Okay. And it shows that 2,737,000  
17     prescriptions for K-Dur were dispensed as written. Is  
18     that correct?

19                 A. In the pharmacy group in the sample, that's  
20     what it appears to be saying.

21                 Q. And of those, only 3000 were filled by another  
22     product. Is that right?

23                 A. That's what it this looks to be saying, yep.

24                 Q. And that's about one-tenth of 1 percent,  
25     correct, sir?

1 A. Yeah, a little over.

2 Q. Slightly.

3 A. Yeah.

4 Q. Okay, let me ask you to turn now to page 664,  
5 which is the year to date data for 1997. Now, that  
6 shows that 2 million --

7 MR. GIDLEY: Excuse me, Mr. Orlans, could I get  
8 a copy of this document?

9 MR. ORLANS: I apologize, I don't have one. I  
10 only have it on the screen. I gave the witness my only  
11 copy.

12 MR. GIDLEY: Could you just wait a minute? I  
13 know we've got all these binders.

14 MR. ORLANS: Surely.

15 MR. GIDLEY: Pardon the interruption, Your  
16 Honor.

17 JUDGE CHAPPELL: That's okay.

18 (Pause in the proceedings.)

19 BY MR. ORLANS:

20 Q. Okay, and we were looking next, Dr. Addanki, to  
21 page 664, which is the year to date data for 1997. Do  
22 you see that, December 1997?

23 A. Yes, I do.

24 Q. Okay. And that shows that 2,958,000  
25 prescriptions were dispensed as written for K-Dur 20,



1 correct?

2 A. That's exactly what the numbers say, yes.

3 Q. Right, and about -- and 3000 of those were  
4 filled by other products, correct?

5 A. That's right.

6 Q. And again, about a tenth of a percent?

7 A. That's about right.

8 Q. Okay. And let me now ask you to turn to page  
9 670, which is the year to date data for December 1998,  
10 and that shows that 3,247,000 prescriptions were  
11 dispensed as written, correct, for K-Dur 20?

12 A. That's what the number says, yes.

13 Q. And only 2000 were dispensed by other products,  
14 correct, or filled by other products?

15 A. That's what is reported here.

16 Q. Okay. So, that's an even lower percentage than  
17 we've been talking about; that's less than a tenth of a  
18 percent.

19 A. Yes, sir.

20 Q. Okay. And let me ask you to turn to page 676,  
21 which is the year to date data for 1999, December 1999,  
22 and that shows that 3,391,000 K-Dur 20 prescriptions  
23 were dispensed as written, correct?

24 A. Yes.

25 Q. And only 2000 were filled by another product,

1 right?

2 A. That's right.

3 Q. Finally, sir, let me ask you to turn to page  
4 861, which is the year to date data for December 2000,  
5 and that shows that 3,424,000 K-Dur 20 prescriptions  
6 were dispensed as written, correct?

7 A. Right.

8 Q. And only 2000 were filled by other products,  
9 correct?

10 A. That's right.

11 Q. All right. So, over this entire period that  
12 we've just been discussing where you say that other  
13 forms of potassium chloride competed with K-Dur 20,  
14 there was never more than one-tenth of a percent of the  
15 K-Dur prescriptions that were filled by other products,  
16 right?

17 MR. GIDLEY: Objection, Your Honor,  
18 mischaracterizes the testimony and the documents.

19 JUDGE CHAPPELL: I'm going to overrule it.  
20 He's a smart man. He can answer it or not.

21 THE WITNESS: To be perfectly frank, I have  
22 not -- I don't recall seeing this, so I'm not quite  
23 sure what -- what's behind these numbers. So, I can't  
24 tell you sitting here now what these numbers are  
25 telling us or not telling us or even whether they're

1 internally consistent. So, I really can't answer that  
2 question.

3 BY MR. ORLANS:

4 Q. That's what the numbers show, though, isn't it,  
5 sir?

6 A. Well, the numbers -- as I've said, the numbers  
7 are what you've recited into the record, but I don't  
8 know what they mean.

9 Q. Let me ask you, sir, to turn to Volume 1, tab  
10 8, which is CX 13, at page 044. Rachel, that's the  
11 first page of the document, and I want the -- under  
12 Overview, the second -- the middle paragraph.

13 A. Where are you now, sir?

14 Q. I'm in Volume 1, tab 8, sir.

15 A. Tab 8, pardon me.

16 Q. On the first page. This is a 1995 marketing  
17 document. Is that correct, sir?

18 A. Yes.

19 Q. And doesn't the middle paragraph read as  
20 follows:

21 "K-DUR does not have an A-B rated generic or 20  
22 mEq competitor. According to the National Substitution  
23 Audit, total K-DUR is substituted only 6% of the time.  
24 The IMS National Prescription Audit projects that K-DUR  
25 10 does have a higher substitution rate of 17%, while

1 K-DUR 20 enjoys a substitution rate of only 1%."

2 Is that correct, sir?

3 A. That's what the document says, yes.

4 Q. All right. And that was as of 1995, right?

5 Wouldn't it be fair to say, sir, that --

6 JUDGE CHAPPELL: Hang on, Mr. Orlans. If you  
7 are going to ask a question, let him answer it.

8 MR. ORLANS: I'm sorry, Your Honor.

9 THE WITNESS: What was the pending question,  
10 I'm sorry?

11 MR. ORLANS: Now I've lost it.

12 Susanne, could you read it back?

13 (The record was read as follows:)

14 "QUESTION: And that was as of 1995, right?"

15 THE WITNESS: That's -- I would assume so, yes.

16 BY MR. ORLANS:

17 Q. So, given the data that we've reviewed, Dr.  
18 Addanki, wouldn't you agree that K-Dur 20 is only  
19 rarely substituted for by a non-A-B generic?

20 MR. SCHILDKRAUT: Objection, Your Honor. This  
21 data was relating to prescriptions that are already  
22 written. I think Mr. Orlans is now talking about a  
23 completely different subject.

24 MR. ORLANS: I'll withdraw it and reframe it,  
25 Your Honor.

1 JUDGE CHAPPELL: Thank you.

2 BY MR. ORLANS:

3 Q. Wouldn't you agree, Dr. Addanki, that once a  
4 K-Dur 20 prescription is written, that it is only  
5 rarely substituted for by the pharmacist arranging for  
6 a switch to another product?

7 A. Okay, as I've said, I'm not quite sure what is  
8 included and what is excluded when they use the word  
9 "substituted" here in this particular context. So, I  
10 don't know the answer to that question.

11 Q. That's what the data show, though, isn't it,  
12 the data we've been discussing?

13 A. Well, the data that I've just said that I  
14 really don't know what their province is and exactly  
15 how they measured it. So, I'm not sure whether this  
16 exhausts the ways in which K-Dur is substituted after  
17 the fact, after the prescription has been written, and  
18 it certainly has nothing to say about substitution at  
19 prescription time.

20 Q. So, Doctor, your position is that you continue  
21 to rely on the testimony of Upsher employees over the  
22 material that we've just reviewed, the data we've just  
23 reviewed. Is that correct?

24 MR. SCHILDKRAUT: Objection, that misstates the  
25 testimony. Dr. Addanki was talking about the cost of

1 switching, not the level of substitution after the  
2 prescription was written in his testimony.

3 JUDGE CHAPPELL: I'll overrule it. I think  
4 it's a straightforward cross exam question.

5 MR. ORLANS: Thank you, Your Honor.

6 JUDGE CHAPPELL: Do you need the reporter to  
7 read it back?

8 THE WITNESS: If you don't mind, Your Honor.

9 (The record was read as follows:)

10 "QUESTION: So, Doctor, your position is that  
11 you continue to rely on the testimony of Upsher  
12 employees over the material that we've just reviewed,  
13 the data we've just reviewed. Is that correct?"

14 THE WITNESS: For what proposition? I don't --  
15 I have not testified as to any particular level of  
16 switching. My point was just to the extent that you  
17 believe that switching costs are an issue, if the  
18 switching costs are borne by pharmacists, who regard  
19 that, if the testimony was correct, as being part of  
20 their cost of doing business, I don't see any switching  
21 costs to the customer coming from that.

22 I don't have a view one way or the other, and I  
23 never testified to a view one way or the other, about  
24 how much switching actually occurs, and given my lack  
25 of complete knowledge about what these numbers say, I

1 don't have one now.

2 BY MR. ORLANS:

3 Q. Didn't you testify, sir, about having seen  
4 testimony that pharmacists will undertake -- that a lot  
5 of the times, pharmacists will undertake to switch a  
6 prescription by calling the physician at issue, and  
7 they regard that as part of the service they provide as  
8 pharmacists? Was that your testimony?

9 A. That was my -- I testified that I recollected  
10 reviewing testimony to that effect.

11 Q. And what I'm asking you, sir, is in light of  
12 the material, the data that we've just reviewed, do you  
13 continue to credit that testimony?

14 A. Credit it to --

15 Q. Consider it appropriate to rely on, consider it  
16 correct.

17 A. For purposes of what? For purposes of saying  
18 that the switching costs will not be borne by the  
19 customer, yes.

20 Q. For purposes of saying, sir, that a lot of  
21 times pharmacists call physicians to switch from K-Dur  
22 20 to another product.

23 A. I'm not sure that that testimony said anything  
24 about K-Dur 20 from another product, I don't recall,  
25 but certainly the proposition that pharmacists will

1 call --

2 Q. So, the testimony is -- why don't we put it  
3 right in front of you here.

4 A. Sure.

5 Q. "The testimony I've seen on that is that a lot  
6 of the times, pharmacists will undertake to switch a  
7 prescription by calling the physician at issue, and  
8 they regard that as part of the service they provide as  
9 pharmacists."

10 Do you see that testimony that you gave, sir?

11 A. I do.

12 Q. All right. Now, the question I'm asking you  
13 is, in light of the data that we've reviewed, do you  
14 continue to view that testimony as accurate and  
15 reliable testimony?

16 A. I don't see any reason why not, yes.

17 Q. We talked a moment ago about Schering promoting  
18 K-Dur 20 as having significant therapeutic advantages.  
19 Do you recall that?

20 A. We talked about Schering promoting K-Dur 20 as  
21 having advantages.

22 Q. Okay, why don't we now talk about therapeutic  
23 advantages. They did promote it as having some  
24 therapeutic advantages, didn't they, sir?

25 A. They promoted it as being -- because of it



1 being a single pill and hence providing any -- a larger  
2 pill and hence providing any given dose of potassium  
3 chloride with fewer tablets than anything else on the  
4 marketplace, that it may lead to increased compliance.

5 Q. Okay. Didn't they also promote it as possibly  
6 having decreased GI irritation?

7 A. I don't recall the extent to which that was in  
8 their promotional material, although I've seen it  
9 referenced certainly.

10 Q. Okay. In formulating your opinion that there  
11 were no therapeutic differences among potassium  
12 chloride products, did you consider Mr. Driscoll's  
13 deposition testimony?

14 A. I'm pretty sure that I've reviewed the  
15 testimony, although I would like to point out that what  
16 I said, that such differences as did exist were not  
17 material to the question of how substitutable these  
18 products were for one another. I didn't say that they  
19 were all identical.

20 Q. Well, is it your position that, in fact, there  
21 may be significant therapeutic differences, sir?

22 A. No.

23 Q. Okay.

24 A. My -- my --

25 Q. That's all I need from you, sir.

1           Would you, Rachel, pull CX 1495 at page 49,  
2   lines 13 to 25, sir? It's in your book at Volume 2,  
3   tab 6.

4           A. Volume 2, tab 6.

5           Q. This is Mr. Driscoll's testimony.

6           A. At what page?

7           Q. At page 49, beginning at line 13.

8           Didn't Mr. Driscoll give the following  
9   testimony:

10           "QUESTION: Mr. Driscoll, the unique delivery  
11   system that K-Dur had, did that create a therapeutic  
12   advantage for the product?

13           "ANSWER: Well, in our judgment, it created  
14   some benefit that we communicated to the physicians,  
15   yes.

16           "QUESTION: Was this the benefit of not having  
17   a lot of potassium sit in the gut creating ulcers?

18           "ANSWER: Basically, yes, deliver more  
19   potassium in a single tablet and it doesn't sit on the  
20   gut, as I described a little bluntly earlier."

21           Is that his testimony?

22           A. Well, that's certainly the testimony reported  
23   here.

24           Q. Okay. And Schering communicated that to  
25   doctors as an advantage, didn't it, sir?

1           A. It certainly promoted the product with, among  
2 other messages, that message.

3           Q. Okay. Did you review and consider any  
4 testimony from Dr. Banker in formulating your opinion  
5 about whether or not K-Dur had any therapeutic  
6 advantages?

7           A. I don't recall what I looked at from Dr.  
8 Banker.

9           Q. Let me show you some testimony that Dr. Banker  
10 gave in this proceeding.

11          A. Do I have this?

12          Q. No, you don't, sir. I'm going to have to put  
13 it up on the screen for you.

14                 This is beginning at page 2960 of the  
15 transcript:

16                 "QUESTION: Very good.

17                 "The authors in Exhibit 721 called the K-Dur  
18 product 'a simple but elegant formulation which is a  
19 masterpiece of solid dosage form strategy to achieve  
20 clinical goals.' Is that correct?

21                 "ANSWER: That's correct, and if you go down on  
22 page 334, if you go down on 334, one, two, three,  
23 four -- five paragraphs, a little lower than the middle  
24 of the page, that's the last sentence in the paragraph,  
25 and it talks about tablets who have combined -- that

1 combine sustained release characteristics with a  
2 rapidly disintegrating tablet, and they specifically  
3 mention the K-Dur product, and they mention that the  
4 crystals are coated with ethylcellulose, a  
5 water-insoluble partner, and then in a rapidly  
6 disintegrating matrix, and they say the purpose is to  
7 minimize GI ulceration, commonly seen with KCl therapy,  
8 and then they make the statement, 'this simple but  
9 elegant formulation is a masterpiece of solid dosage  
10 form strategy to achieve clinical goals,' and the  
11 clinical goal was to reduce irritation and toxicity."

12 "QUESTION: Do you agree with the assessment?"

13 And then there was a gap of some discussion  
14 with counsel and so forth, and then at the end, the  
15 witness says:

16 "ANSWER: I might add, while you didn't ask me,  
17 I agree with the two authors of that chapter, that it  
18 was a -- what they said, I completely agree with. It  
19 was such a breakthrough."

20 Did you consider that testimony, sir, in  
21 formulating your opinion?

22 A. Yes, I believe that I've also seen some  
23 testimony of Dr. Banker that he was very excited about  
24 the coating technology involved in this product. I'm  
25 aware of his position on that.

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1 Q. In terms of compliance, sir, isn't it true that  
2 patients typically use 20 mEq per day?

3 A. No, I think we talked about this. There are  
4 different dosing ranges for potassium chloride. Twenty  
5 is for the prevention of hypokalemia, and if I  
6 understand correctly, for the treatment of hypokalemia,  
7 you have 40 to 100.

8 Q. Let me ask you, sir, to turn to CX 21, which is  
9 Volume 1, tab 15, at 833 -- I'm sorry, I must have the  
10 wrong -- strike that, I may have my numbers off here.  
11 Let me see if I can find the correct document. Tab 8?  
12 I don't know where I got tab 15 from.

13 (Counsel conferring.)

14 MR. ORLANS: Your Honor, since I seem to have  
15 misplaced the document, it may be an appropriate  
16 breaking point, unless you want to continue, then it  
17 may take me a minute or two to find it.

18 JUDGE CHAPPELL: Let's take a pause while you  
19 locate the document. I'd like to break for lunch  
20 around 1:45.

21 MR. ORLANS: 1:45, okay.

22 (Pause in the proceedings.)

23 BY MR. ORLANS:

24 Q. Okay, I think we're there. Rachel, what we're  
25 looking for is CX 21, Volume 1, tab 15, and Rachel, if

1 you could pull page 833 at the very bottom of the page.

2 This is an Upsher document. Is that right,  
3 sir?

4 A. Yes.

5 Q. Okay. At the bottom of the page under -- which  
6 is page 833, under Dosage/Formulations, doesn't the  
7 document state, "Patients are typically on 20 mEq of  
8 potassium chloride per day"?

9 Isn't that right?

10 A. Well, that's what the document says. One of  
11 the other ones you showed me says at least 20  
12 milliequivalents.

13 Q. Well, and in fact, it's true that a vast  
14 majority of prescriptions are written for at least 20  
15 mEq per day. Isn't that also correct?

16 A. That is correct. That's my understanding at  
17 least.

18 Q. Okay. Would you agree, sir, that for most  
19 patients, K-Dur 20 is a more convenient dosage form?  
20 Isn't that right?

21 A. Well, it's a trade-off between the size of the  
22 pill and having one pill. It's a large pill.

23 Q. But it is the dosage that people need. Is that  
24 right?

25 A. It gives you the 20 milliequivalent in one

1 pill, but as I think we've seen, you can get exactly  
2 the same effect with two 10s, which are smaller.

3 Q. Indeed you can, sir, and at 200 to 300 percent  
4 premium. Isn't that right?

5 A. At 200 --

6 MR. SCHILDKRAUT: Objection, no foundation.

7 MR. ORLANS: 200 to 300 percent price premium.

8 MR. SCHILDKRAUT: Objection, no foundation for  
9 that, unless you're saying it was a 300 percent price  
10 premium for K-Dur 10 over K-Dur 20.

11 BY MR. ORLANS:

12 Q. There is a 200 to 300 percent price premium for  
13 Klor Con 10, the product broken apart in this  
14 courtroom, as there is for K-Dur 20, right? Excuse me,  
15 it was the product that was doubled in this courtroom.

16 A. Well, the IMS data we saw today, if we're  
17 talking about the testimony from earlier this morning,  
18 the IMS data that we saw today, which is not a price  
19 paid by any end user or payer, did have two to three  
20 times -- a ratio of two to three times between generic  
21 and K-Dur 20 if that's what you're referring to.

22 Q. Right. And in fact, in terms of the IMS data,  
23 sir, we did look at your own pricing demonstratives to  
24 draw those conclusions, didn't we, sir?

25 A. Right, but these have nothing to do with the

1 premium paid by consumers.

2 Q. And that's because of rebates. Is that your  
3 view, sir?

4 A. Well, it's also because the -- the structure of  
5 pricing for generics and branded pharmaceuticals is  
6 different, so that the pharmacists get, as I understand  
7 it, a higher profit markup in percent terms on generics  
8 than they do on branded pharmaceuticals.

9 Q. But they also pay a larger price for the  
10 brandeds. Isn't that right?

11 A. That's right, but those two tend to have  
12 offsetting effects as far as determining the final  
13 price is concerned to the consumer.

14 Q. Is it your position, Dr. Addanki, that Schering  
15 was being less than truthful when it told doctors that  
16 K-Dur 20 had advantages in terms of gastric -- less  
17 gastric discomfort than -- over other products?

18 A. I think Schering in promoting its product was  
19 using every -- every advantage and lever that it could  
20 in promoting that product.

21 Q. And it promoted the product as having  
22 therapeutic advantages, correct?

23 A. Among other things.

24 Q. Okay, let's talk about price discrimination,  
25 Doctor. Price discrimination is when different



1 customers are charged different prices for the same or  
2 similar products. Is that right?

3 A. I believe that's a workable definition.

4 Q. And the other day you said you didn't study  
5 price discrimination to determine whether Schering had  
6 monopoly power. Is that correct?

7 A. In this case, that's correct.

8 Q. And in your view, price discrimination simply  
9 has no bearing on whether or not someone has monopoly  
10 power. Is that also right?

11 A. That's right, price discrimination does not  
12 tell you anything about whether someone has monopoly  
13 power or not.

14 Q. In your direct examination, you referred to an  
15 instance where Kaiser, a large staff model HMO, had  
16 prevailed on Schering to provide drastic price  
17 reductions on K-Dur 20. Do you recall that?

18 A. Yes, I do.

19 Q. Isn't it true that Schering has recognized that  
20 large staff model HMOs are far more price sensitive  
21 than other types of customers?

22 A. I think the bottom line there is that they view  
23 the staff model HMOs as the leading edge of managed  
24 care's ability to influence prescribing behavior, and  
25 so it's in that sense that they view the staff model

1 HMO as the first battleground, if you will.

2 Q. All right, now let's go back and answer my  
3 question.

4 Isn't it true that Schering recognized that  
5 large staff model HMOs are far more price sensitive  
6 than other customers, other types of customers? Isn't  
7 that correct? Yes or no, sir.

8 A. I'm not sure. Maybe they did think of it in  
9 those terms.

10 Q. Let me ask you this: Customers that were not  
11 large HMOs like Kaiser had to continue to pay the  
12 higher prices, isn't that right, the higher brand  
13 prices?

14 A. Well, I'm not sure what you mean by "high  
15 prices."

16 Q. Well, you talked about -- and let me make it  
17 clear for you. You talked about how Kaiser was able to  
18 push to get a price cut, a significant price cut, as I  
19 recall. Isn't that right?

20 A. Essentially they got the equivalent of a  
21 private label product is what they got.

22 Q. Okay. Other customers of Schering weren't able  
23 to do that, were they?

24 A. You know, I think they were reviewing that with  
25 some other managed care organizations. I don't recall

1 if they ever got to the point of a private label  
2 product for another managed care organization, but I  
3 know that there were various forms of price breaks and  
4 discounting that went on all the time.

5 Q. Isn't it clear, sir, that Schering was able to  
6 price discriminate against its non-staff model HMO  
7 customers?

8 A. That's a -- that's a funny way to put it.  
9 Giving one customer a good break to me doesn't mean  
10 you're price discriminating against everyone else.  
11 You're favorably price discriminating for that  
12 customer, but I'm -- I mean, I'm not sure --

13 Q. Well, let me see if we can't explore that a  
14 little further in another direction, sir.

15 You're familiar with a treatise by Areeda on  
16 antitrust, are you not, sir?

17 A. Yes.

18 Q. Let me point you to a section in Areeda, page  
19 204, it is under 533(D), Section 533(D), Price  
20 Discrimination, and I want to read you a paragraph and  
21 see if you agree or disagree with it. It begins:

22 "For example, suppose that the defendant is the  
23 sole producer of a pharmaceutical that has some,  
24 howbeit imperfect, substitutes. Managed care  
25 organizations such as HMOs will authorize a single

1 pharmaceutical within a grouping, and thus the  
2 manufacturer must compete with the substitutes to be  
3 the provider. By contrast, pharmacies must carry a  
4 full line of all brands, even if they are substitutes,  
5 because they must be ready to fill prescriptions on  
6 demand. There might then be at least two markets  
7 relevant to judging the defendant's power over price:  
8 Sales of its branded pharmaceutical generally; and  
9 sales to pharmacies. The former market includes the  
10 managed care purchasers, while the latter does not. A  
11 court might then speak imprecisely of a relevant market  
12 for 'sales of brand X pharmaceutical,' and of a  
13 relevant 'submarket' for 'sales of brand X  
14 pharmaceutical to pharmacies.' But this formulation is  
15 neither correct nor the least bit helpful. If the  
16 defendant is not able to charge a monopoly price for  
17 its product generally, then the grouping of general  
18 sales of that product is not a relevant market. If the  
19 defendant can profit by charging pharmacies a price  
20 significantly over its cost, then the pharmacy sales  
21 are a relevant market, and it does not matter one whit  
22 whether the broader grouping is or is not a relevant  
23 market as well."

24 Do you agree or disagree with that?

25 A. Could you show me the footnote, please?

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1 Q. Sure.

2 A. Okay.

3 Q. Okay? I'm sorry.

4 A. I certainly didn't memorize the passage.

5 Q. Let me help you by paraphrasing it, sir, maybe  
6 make it a little bit easier.

7 Isn't the point here simply that the fact that  
8 some customers were able to avoid paying a higher price  
9 may exclude them from the relevant market but still  
10 means that market power is being exerted against those  
11 who can't avoid paying the higher price?

12 A. It's -- it's certainly -- I would certainly  
13 agree that if you had evidence that monopoly power was  
14 being exerted against a group of customers, then I  
15 would certainly agree, but the fact that there was a  
16 customer against whom it wasn't exerted doesn't change  
17 the fact that you found monopoly power in this only one  
18 group of customers. So, I certainly agree with that,  
19 and as far as I can tell, that's what it's saying.

20 Q. Okay. And don't the merger guidelines make  
21 essentially the same point; namely, that the fact that  
22 some customers are able to avoid paying a higher price  
23 may exclude them from the market but still means that  
24 market power is being exerted against those who can't  
25 avoid paying the higher prices?

1           A. Again, if the question is can monopoly power be  
2           exerted against some group of customers and would that  
3           be some cause of concern, I think the answer is yes, it  
4           could be and that could be a cause of concern.

5           Q. Let me ask you this, sir: Isn't it true that  
6           the opportunity to price discriminate requires monopoly  
7           power?

8           A. Absolutely not.

9           MR. ORLANS: May I approach, Your Honor?

10          JUDGE CHAPPELL: Yes, you may.

11          MR. ORLANS: I'll put this on the ELMO, but let  
12          me give the witness one he can look at.

13          THE WITNESS: Thank you.

14          BY MR. ORLANS:

15          Q. Doctor, I'm showing you an article entitled  
16          "Predatory Systems Rivalry: A Reply," written by Dr.  
17          Ordover, Dr. Willig and Alan O. Seitz, whom I don't  
18          know, but do you know who Dr. Ordover is, sir?

19          A. Yes.

20          Q. And you recognize him as an expert, do you not?

21          A. What do you mean by an "expert"?

22          Q. An expert in the field of economics and  
23          industrial organization.

24          A. He's certainly written lots of articles on  
25          industrial organization.

1           Q.   Okay.  And he's, in fact, an expert designated  
2   by Upsher in this proceeding, isn't he, sir?  Do you  
3   know that?

4           A.   That's my understanding.

5           Q.   Okay.  And Dr. Willig, isn't he an expert  
6   designated by Schering in this proceeding?

7           A.   That's correct.

8           Q.   Let me ask you to turn, sir, to page 1154 of  
9   this article, which appeared in the Columbia Law  
10  Review, I think the volume was 83 Columbia Law Review  
11  at 1150, and I'm specifically directing your attention  
12  to page 1154, and in the first bracketed quote that  
13  I've identified, it reads as follows:

14                "Sidak does attempt to analyze the second  
15  possible welfare-decreasing motivation for  
16  technological tie-ins -- the desire to price  
17  discriminate.  It is clear that the opportunity to  
18  price discriminate also requires monopoly power, and  
19  that systems rivalry is one way to obtain that power."

20                And then later on, at the bottom of that page,  
21  the article states, "For the monopolist to price  
22  discriminate by setting a supracompetitive price on a  
23  system component, he must first obtain monopoly power  
24  over that component."

25                Do you agree or disagree with those statements,

1     sir?

2           A. Well, in the context of this article and a  
3     particular model that they have developed -- first of  
4     all, I'm not sure that I agree or disagree, because I  
5     haven't read this model, at least not recently, and  
6     second, I certainly don't think without reading this  
7     and thinking about it I would know the extent to which  
8     it's generally applicable. Certainly they don't seem  
9     to be saying here that the ability to charge a lower  
10    price to someone requires that you have monopoly power.

11          Q. All right, let's move on, sir.

12                 Isn't it a well-recognized economic principle  
13    applicable in the pharmaceutical industry as well as  
14    others that a monopolist's pricing behavior can be  
15    explained by its desire to charge higher prices to less  
16    price-sensitive customers?

17          A. It's not just a monopolist. If you can  
18    actually charge different prices to different  
19    customers, you will do it, and lots of companies or  
20    firms -- lots of firms in the economy do it, and no one  
21    would dream that they have monopoly power.

22          Q. But in fact, sir, without monopoly or market  
23    power, you can't really make that price increase stick,  
24    because there are substitute products. Isn't that  
25    right?



1           A. You're talking in terms of a price increase,  
2           and very often what we're talking about in price  
3           discrimination is differential discounts to different  
4           customers. It's the -- exactly the example I spoke  
5           about and a million more.

6           Q. But similarly, if differential discounts are  
7           available from one manufacturer for certain customers,  
8           you would expect customers who could not get it from  
9           that manufacturer to seek it from others. Isn't that  
10          right?

11          A. To seek what from others?

12          Q. Seek that discount. If there were substitute  
13          products available, sir, and my manufacturer won't give  
14          me a discount, wouldn't I go elsewhere shopping for  
15          that discount?

16          A. Yes, if that manufacturer wants to give you  
17          that -- if the other manufacturer wants to give you  
18          that discount, he will or she will.

19          Q. Do you know, sir, what percentage of K-Dur's  
20          sales are represented by its sales to HMOs, including  
21          staff model HMOs like Kaiser?

22          A. I've seen statistics on that, but I don't  
23          recall the numbers.

24          Q. Let me ask you to turn to Volume 1, tab 12, and  
25          Rachel, that will be CX 20 at page 037. I need to do

1 this. If you could enlarge the chart, Rachel, at the  
2 top.

3 Doesn't that indicate, sir, that in 1996 and  
4 midway through 1997 that all HMOs represented only 1  
5 percent of Schering's dollar sales by volume?

6 A. Yes, it does say that HMOs are about 1 percent.

7 Q. Okay. Now, you talked about -- we can go away  
8 from that, Rachel -- you talked about K-Dur's  
9 promotional activities and the impact of brand  
10 building. Do you recall some of that testimony?

11 A. I'm sorry, Mr. Orlans, what was that?

12 Q. We were talking about or I was trying to direct  
13 your attention to some of your testimony about the  
14 significance of K-Dur's promotional activities. Do you  
15 recall that?

16 A. Yes, I do.

17 Q. Okay. Isn't it true, sir, that K-Dur, in fact,  
18 received only minimal promotional support from  
19 Schering?

20 A. Compared to what?

21 Q. Compared to other products.

22 A. Compared to other Schering products? They  
23 certainly received a lot more promotional support than  
24 plenty of other products in the potassium chloride  
25 segment.

1 Q. Well, let me ask you to -- let me ask you to  
2 turn to --

3 (Counsel conferring.)

4 BY MR. ORLANS:

5 Q. Let me ask you to turn, Dr. Addanki, to Volume  
6 1, tab 12, which is CX 20, at page 11. Actually,  
7 that's -- Rachel, for your purposes -- I'm sorry, it's  
8 actually -- it's 046, page 10, I'm sorry.

9 At the top of the page, under Forecast -- this  
10 is, by the way, the 1997 -- I'm confusing you, Doctor.  
11 I think I'm flipping tabs on you. I directed you to  
12 12, so it's the 1998 K-Dur marketing plan, which is  
13 CX 20, and it is page -- the bottom of page 11, yes,  
14 which is page 040.

15 Doesn't the 1998 K-Dur marketing plan conclude  
16 in the bottom sentence, "The forecast also assumes that  
17 there are no new product introductions, and K-Dur  
18 continues to receive minimal detail and promotional  
19 support"?

20 Do you see that?

21 A. Yes.

22 Q. Okay. Let me next direct your attention to  
23 CX 18, which is the 1997 marketing plan, and that's  
24 Volume 1, tab 11, and that's at page 046 at the top of  
25 the page. It makes the same statement, does it not,

1       that K-Dur continues to receive minimal detail and  
2       promotional support?

3           A.   It's verbatim the same statement.

4           Q.   Um-hum.   And finally, sir, CX 16, which is  
5       Volume 1, tab 10, at page 543 at the top of the page,  
6       that talks about declines in promotional support  
7       continuing in 1996 with journal and detail expenditures  
8       down 13 percent from the same period in 1995.

9           Do you see that?

10          A.   What page are you on, sir?

11          Q.   Page 543, I'm sorry, at the top of the page.

12          A.   Ah.   Yes.

13          Q.   Okay.   And then at 546, under Forecast, again,  
14       the assumption or the statement is that K-Dur continues  
15       to receive minimal detail and promotional support.

16                So, at least in Schering's view, this was a  
17       product that they were providing minimal promotional  
18       support for.   Isn't that right?

19          A.   Well, the other -- the same document talks in  
20       other places, these same documents, about the degree to  
21       which they dominate promotion in this market.

22          Q.   And that's because nobody else was promoting  
23       very much.   Isn't that right?

24          A.   No one was promoting almost at all, and  
25       Schering was promoting a fair amount for this market.

1           Q.   Okay.  In fact, sir, isn't it true that  
2   Schering's promotional and selling expenses were in the  
3   range of 4 to 6 percent a year from 1995 to 2000?

4           A.   That's about right.

5           Q.   In the scheme of promotion to sales ratios,  
6   those are fairly low numbers, aren't they, sir?

7           A.   Not for this segment.

8           Q.   In general, overall.

9           A.   But the point is it's what's relevant to the  
10   segment that counts, and to the segment this was high.

11          Q.   And that's because no one else was advertising  
12   or promoting, correct?

13          A.   No one was promoting.

14          Q.   Okay, apparently my question was less complete  
15   than it should have been, Dr. Addanki, and when I asked  
16   you before about 4 to 6 percent, what I was talking  
17   about was the promotion to sales ratio, that is, that  
18   the percentage of the promotional expenditures -- of  
19   the promotional expenditures compared to the overall  
20   sales revenues.  You understood that, correct?

21          A.   That was what I understood your question to  
22   mean.

23          Q.   That's fine.

24                Dr. Addanki, while ago when we were talking  
25   about some of the branded products and the way that

1     they were viewed at Schering, isn't it true that  
2     Schering viewed the branded competition as maintaining  
3     only a minor presence in the market?

4           A. I think depending on when you look, Schering  
5     recognized what incentives for promotion the branded  
6     products had, and depending on what it saw as those  
7     incentives, it saw them as being more or less likely to  
8     be promoting and going after sales.

9           Q. Yeah, and maybe I misled you, because I wasn't  
10    talking about promotion at this point. Just in general  
11    in terms of sales, we had had a discussion a while ago  
12    about the -- Schering's response to the generics, and  
13    we had talks a little bit about branded products, and  
14    the only point I wanted to make to harken back to that  
15    is to ask you whether it isn't true that Schering, at  
16    least in terms of sales, that Schering viewed the  
17    branded products as having only a minor presence in the  
18    market?

19          A. I think that depends on when you look. That  
20    may have been true at some point in the period.

21          Q. Well, in fact, wasn't that true in 1996?

22          A. I don't recall.

23          Q. Let me show you actually the 1996 marketing  
24    plan, which is tab 21, that's SPX 954 at page 943, and  
25    this is, as I said, the 1996 K-Dur marketing plan.

1           Didn't Schering conclude, and I quote, "The  
2    'branded' competition (Micro-K 8/10, Slow K, K-Tab)  
3    continues to maintain a minor presence in the market  
4    and are garnering sales based on past history"?

5           Isn't that their conclusion?

6           A. I'm sorry, what page are you on?

7           Q. Page 943.

8           A. Page 943. Right.

9           Q. And Micro-K and K-Tab are the two branded  
10   products they were discussing earlier when we talked  
11   about sales, right?

12          A. Yes, they are.

13          Q. Price, excuse me.

14          A. Yes, they are.

15          Q. On Thursday, sir, you testified that entry into  
16   potassium chloride products was easy. Do you remember  
17   that?

18          A. I think -- I believe I testified that there  
19   were no barriers to entry and that there had been lots  
20   of entry.

21          Q. And you said entry was not difficult, correct?

22          A. That's -- that's my recollection.

23          Q. Do you have any idea of the time required for  
24   regulatory approval by the FDA of a new prescription  
25   potassium chloride product, sir?

1           A. I'm not an expert on those specifics, and I do  
2 understand that it depends on exactly how you want to  
3 get in in terms of the type of rating you're looking  
4 for.

5           Q. Let me show you an exhibit that's been marked  
6 for identification as Commission Exhibit for  
7 identification CX 1712.

8           May I approach, Your Honor?

9           JUDGE CHAPPELL: Yes, you may.

10          MR. ORLANS: Your Honor, this is a new  
11 document, so I haven't yet provided one to the Court,  
12 and I can't show it on the screen. Would Your Honor  
13 like to have a look at it?

14          JUDGE CHAPPELL: Yes.

15          (Commission Exhibit Number 1712 was marked for  
16 identification.)

17          BY MR. ORLANS:

18          Q. What I'm showing you, sir, which has been  
19 marked for identification as CX 1712, is a document  
20 from the Center for Drug Evaluation and Research, 1999  
21 Report to the Nation.

22          Have you ever seen this before, sir?

23          A. No, it doesn't look familiar.

24          Q. Okay. You don't know what the Center for Drug  
25 Evaluation and Research is, do you, or do you?



1           A. I don't -- if I did, I don't recall.

2           Q. Okay. It's the part of the Food and Drug  
3 Administration responsible for making sure that new  
4 drugs are safe and effective, and that's reflected  
5 actually on page 1.

6           Your Honor, before using this document, I might  
7 as well offer it into evidence. I believe it is  
8 self-authenticating and it is a public document by the  
9 Food and Drug Administration.

10          MR. GIDLEY: Your Honor, we're not objecting at  
11 this time, but we can't at the same time agree to its  
12 admission. We would like a chance to review it at  
13 least over the lunch hour.

14          MR. SCHILDKRAUT: Your Honor, we need a chance  
15 to review this document also. We've never seen it  
16 before.

17          MR. ORLANS: I have no problem with that, Your  
18 Honor, as long as I can question on a portion of the  
19 document.

20          JUDGE CHAPPELL: Go ahead. You will need to  
21 offer it later.

22          MR. ORLANS: That's fine.

23          BY MR. ORLANS:

24          Q. Let me ask you, sir, to turn to page 7 of the  
25 document, and on page 7, the chart tracks the median

1 time for FDA review and approval of an NDA, a new drug  
2 application. Isn't that right?

3 A. Yes, that's what it seems to be doing.

4 Q. Okay. And in 1997, the median review time was  
5 12.2 months. Is that correct, sir? I think the figure  
6 on the right, Doctor, is the -- is the review time and  
7 the figure on the left is the approval time. The bar  
8 on the left I should say.

9 A. Oh, I see, yes, I was just trying to think of  
10 how to key those two --

11 Q. Yes, the larger number is the approval time.

12 A. Okay.

13 Q. Okay? So, what it shows, looking at 1997, is  
14 that the review time at the FDA for an NDA in 1997 was  
15 12.2 months, and the approval time was 14.4 months,  
16 correct?

17 A. Accepting your representation about the key,  
18 yes, that's what it says.

19 Q. Okay. And that's, of course, just the time it  
20 would take the FDA to review the product, not the time  
21 to develop the product, right?

22 MR. SCHILDKRAUT: I assume you're talking about  
23 NDA products now when you say "review the product"?

24 MR. ORLANS: Yes, I am.

25 THE WITNESS: Yeah, this would be the time for

1 the FDA to approve the NDA.

2 BY MR. ORLANS:

3 Q. Okay. And again, it doesn't include the time  
4 it takes the company to develop the product.

5 A. That would be correct.

6 Q. Okay. Now, another possibility is that  
7 somebody could file an ANDA for a potassium chloride  
8 prescription product, correct?

9 A. That's correct.

10 Q. Okay, and let me ask you to turn to page 13 of  
11 the document, and that shows that in 1997, the median  
12 approval time for the filing of an ANDA -- the  
13 approval, excuse me, of an ANDA was 19.3 months,  
14 correct?

15 A. Yes.

16 Q. Okay. And again, this is just the FDA approval  
17 process, not the time that you'd have to spend  
18 developing the generic product prior to filing the  
19 ANDA, right?

20 A. And this is the median, yes.

21 Q. Do you know, sir, when K-Dur 20 first came on  
22 the market?

23 A. I believe it was during the 1980s. I don't  
24 remember the exact date, but in that time frame.

25 Q. '86, '87, somewhere in that range?

1           A. Mid-1980s is my recollection.

2           Q. Okay. And it was until 2001 before there was  
3 an A-B rated generic on the market. Is that correct?

4           A. Well, yes, that's right.

5           Q. Do you know how long it took the FDA to approve  
6 Upsher's ANDA?

7           A. I don't recall the specifics. I know it was  
8 issued late 1998.

9           Q. Right. It was filed in June 1995, wasn't it?

10          A. I don't recall, but that's -- I'll accept your  
11 statement to that effect.

12          Q. Okay. So, that would be over three years for  
13 FDA approval of the product. Is that correct?

14          A. For this product.

15          Q. Um-hum.

16          A. That's correct.

17          Q. Under these circumstances, sir, given this  
18 historical experience we've just discussed, the need  
19 for regulatory approval, the need for company  
20 development, wouldn't you say that those factors all  
21 taken together demonstrate that entry of an A-B rated  
22 generic for K-Dur 20 was, in fact, quite difficult?

23               MR. SCHILDKRAUT: Objection, Your Honor. This  
24 data we're looking at, we're looking at it for the  
25 first time, has nothing to do with potassium chloride.

1 It has to do with all drugs in general.

2 MR. ORLANS: I think, Your Honor, what I've  
3 done is established both a general time frame and a  
4 more specific time frame applicable to this case, and I  
5 think putting the two together, it's a fair question to  
6 ask an expert.

7 MR. SCHILDKRAUT: The specific time frame is  
8 only for an A-B rated generic, one A-B rated generic.  
9 It's got nothing to do with all the other ways that you  
10 could enter this market.

11 JUDGE CHAPPELL: I'll overrule the objection to  
12 the extent this expert thinks he has enough information  
13 to form an opinion or answer the question.

14 THE WITNESS: The -- as I had said a couple of  
15 minutes ago, these are medians, and so they really  
16 don't tell you anything about what the variance is  
17 around that median, what the variation is around that  
18 median. So, the fact that an ANDA to -- whatever it  
19 is, took 19 months median time and that an NDA took 14  
20 months median time really doesn't tell you anything  
21 about what a specific application would have taken.

22 BY MR. ORLANS:

23 Q. But you do know, sir, that Upsher's application  
24 in this case took over three years, correct?

25 A. And second -- I was just going to say in

1 response to your question, second, that Upsher's ANDA,  
2 which is specific to Upsher and specific to the  
3 product, which is just one out of many ways you could  
4 enter the potassium chloride supplementation market,  
5 did, in fact, accepting your representations, take  
6 three and a half years or so.

7 MR. ORLANS: Your Honor, this is a convenient  
8 breaking point.

9 JUDGE CHAPPELL: Okay, Mr. Orlans. Let's take  
10 our lunch break until 2:50, 2-5-0. Thank you.

11 (Whereupon, at 1:50 p.m., a lunch recess was  
12 taken.)

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1 AFTERNOON SESSION

2 (2:50 p.m.)

3 JUDGE CHAPPELL: Mr. Orlans, you may proceed.

4 MR. ORLANS: Thank you, Your Honor.

5 Before I resume questioning the witness, we  
6 might as well deal with the outstanding document. I  
7 would like to offer Commission Exhibit 1712 into  
8 evidence.

9 MR. SCHILDKRAUT: We object, Your Honor. We  
10 think the document is irrelevant. It tells us nothing  
11 at all about the potassium chloride market. These are  
12 general averages. It's not probative of anything.

13 MR. ORLANS: I think the averages clearly are  
14 relevant, Your Honor.

15 MR. GIDLEY: Your Honor, we don't object  
16 because it's not relevant.

17 JUDGE CHAPPELL: Do you object?

18 MR. GIDLEY: No, Your Honor, we do not. It can  
19 be admitted.

20 JUDGE CHAPPELL: So, we have one objection and  
21 one not objection.

22 MR. SCHILDKRAUT: Well, his objection is  
23 because it's not relevant, he doesn't care. I think  
24 the document is not relevant at all.

25 MR. ORLANS: And I think, Your Honor, the

1 numbers that I discussed with the witness clearly are  
2 useful numbers in assessing the barriers imposed by the  
3 regulatory obstacles.

4 MR. SCHILDKRAUT: I am not asking that the  
5 testimony that -- on this be struck from the record, so  
6 I am not -- I am not asking that the pages that Mr.  
7 Orlans used, that any of that testimony be struck. I  
8 don't have a problem with that, because the -- because  
9 Dr. Addanki basically said it was not relevant, so  
10 that's in evidence.

11 JUDGE CHAPPELL: Are you saying it's -- you're  
12 objecting on relevancy for this witness or for the  
13 entire proceeding?

14 MR. SCHILDKRAUT: For the entire proceeding.  
15 This is being introduced as a matter of -- that it  
16 takes a long time for a drug to get in the market.  
17 First of all, I don't think those times are so long,  
18 but even beyond that, it has nothing to do with  
19 potassium chloride. As Dr. Addanki said, this is  
20 just -- this is just an average.

21 JUDGE CHAPPELL: So, it's too general in  
22 nature?

23 MR. SCHILDKRAUT: It's too general to be  
24 probative of anything.

25 JUDGE CHAPPELL: Mr. Orlans?



1           MR. ORLANS: Well, I think it provides the  
2 background, Your Honor, against which one can weigh and  
3 evaluate things like the fact that it took Upsher-Smith  
4 three years to get its ANDA approved.

5           MR. SCHILDKRAUT: Which is a completely  
6 separate point outside this document, and obviously we  
7 didn't object to Dr. Addanki being questioned on that.  
8 And in any event, I assume that Mr. Orlans is not  
9 asking that the remainder of the document be admitted  
10 other than -- because I don't know what's in the  
11 remainder of the document. So, we're really only  
12 discussing those couple of pages where it talked about  
13 the general time to enter, not the time that it would  
14 take to enter into potassium chloride.

15           MR. ORLANS: Well, Your Honor, it is a public  
16 document, and I can't say that I've parsed through the  
17 entire document at this point either to see what else  
18 is in it, but clearly there are portions of this that  
19 discuss the process, the FDA process, that could be  
20 useful to this proceeding.

21           JUDGE CHAPPELL: He's -- he asked you, I think  
22 indirectly, if you're offering this entire document or  
23 just the pages you referred to in questioning this  
24 witness.

25           MR. ORLANS: Well, and Your Honor, I was

1 offering the entire document, and it seems to me that  
2 to try to parse the document down to just a few pages  
3 is, you know, is -- given the materials that have  
4 already been admitted here in toto is sort of  
5 unnecessary. I mean, I would be willing to do that if  
6 the Court was so inclined, but it just strikes me that  
7 there's no reason why we shouldn't admit a 36-page  
8 document into evidence.

9 JUDGE CHAPPELL: Mr. Gidley, do you not object  
10 to the entire document?

11 MR. GIDLEY: Your Honor, we do not object to  
12 the admission of this document. We do not think that  
13 it bears on any issue that impairs our defense in any  
14 way, shape or form, Your Honor.

15 MR. ORLANS: And insofar as Mr. Schildkraut's  
16 comment is concerned, I certainly want to be able to  
17 cite to the document and not just to the witness'  
18 testimony about the document.

19 JUDGE CHAPPELL: I'm not sure how relevant it  
20 is, but the witness was questioned about it, so at  
21 least it's demonstrative. Therefore, I'm going to  
22 allow it. So, CX 1712 is admitted.

23 MR. ORLANS: Thank you, Your Honor.

24 (Commission Exhibit Number 1712 was admitted  
25 into evidence.)

1 BY MR. ORLANS:

2 Q. Dr. Addanki, let me just go back to the entry  
3 discussion we were having for what hopefully will be  
4 one last question as a follow-up and conclusion.

5 Would you agree based on the discussion we had  
6 prior to lunch that the entry of an A-B rated generic  
7 to K-Dur 20 was quite difficult?

8 A. All I think we can conclude is that it took  
9 Upsher some time to get its A-B rated generic approved,  
10 but I'm not sure that tells us anything about what  
11 someone else might have done had they wanted to come  
12 in.

13 Q. But you know it took Upsher over three years,  
14 correct?

15 A. That's my understanding.

16 Q. And you also --

17 A. Excuse me, I haven't had a chance to verify  
18 your 1995 application date, but taking that as correct,  
19 that's right.

20 Q. And you also know that that's only the FDA  
21 regulatory portion of it, not the development of the  
22 product, correct?

23 A. That's correct.

24 Q. Okay. And you also know that K-Dur 20 was on  
25 the market for somewhere in the range of 15 years or

1 more before an A-B rated generic came on. Isn't that  
2 correct?

3 A. Before an A-B rated generic actually entered,  
4 that's correct.

5 Q. Right. And on those facts, you're not prepared  
6 to conclude that entry is difficult?

7 MR. SCHILDKRAUT: Objection, Your Honor. Entry  
8 difficult in what market?

9 MR. ORLANS: Your Honor, if Mr. Schildkraut  
10 wants to argue his case here, it's clear I'm talking  
11 about the entry of an A-B rated generic to K-Dur 20.

12 MR. SCHILDKRAUT: Fine, that's all I want.

13 MR. ORLANS: That was clear from the question.

14 JUDGE CHAPPELL: Well, I don't think he thought  
15 it was, Mr. Orlans, so let's keep a civil tone, okay?

16 MR. ORLANS: Well, it's just, Your Honor, that  
17 Mr. Schildkraut at every opportunity seems to want to  
18 argue his case for a broader market, and this is not  
19 the time and the place to do that. He's made his point  
20 through the witness that he thinks there's a broader  
21 market. I think there's a narrower one, and I think my  
22 questions have been quite clear.

23 JUDGE CHAPPELL: So, it's okay for you to argue  
24 your point, but not him?

25 MR. ORLANS: Well, I am arguing with the

1 witness, Your Honor, and that's an appropriate  
2 dialogue. He argued with the witness when he was on  
3 direct. He shouldn't be arguing with me when I'm  
4 trying to examine the witness.

5 JUDGE CHAPPELL: Is the objection withdrawn?

6 MR. SCHILDKRAUT: Yes, he clarified, which was  
7 fine.

8 JUDGE CHAPPELL: Susanne, would you read the  
9 question back?

10 (The record was read as follows:)

11 "QUESTION: And on those facts, you're not  
12 prepared to conclude that entry is difficult?"

13 THE WITNESS: And now you are talking about the  
14 entry with an A-B rated generic to K-Dur 20?

15 BY MR. ORLANS:

16 Q. That's correct.

17 A. I just don't know enough about it one way or  
18 the other. I don't know what someone else would know.

19 Q. Doctor, the second element of your test is to  
20 compare the settlement result with the expected outcome  
21 under litigation, correct?

22 A. That's correct.

23 Q. And you've made no independent analysis of the  
24 odds of that occurring, right?

25 A. Of the odds of what?

1           Q. Of the odds of each party prevailing under  
2 litigation.

3           A. That's correct.

4           Q. You're not talking now about the parties' own  
5 assessments of the litigation, right?

6           A. That's right, I'm talking about the objective  
7 odds.

8           Q. Okay. You're talking about somebody coming up  
9 with the true or objective odds.

10          A. That's correct.

11          Q. Okay. For your test to be workable, the true  
12 or objective odds that existed in the patent suit prior  
13 to settlement must be capable of being reliably and  
14 validly ascertained, right?

15          A. No, I think it's sufficient if you -- it could  
16 be sufficient to have ranges.

17          Q. Well, that's interesting, Doctor, and we'll  
18 come back to that, an interesting answer, but accepting  
19 the fact that you think ranges would be sufficient --  
20 well, strike that. Let me begin that again.

21                 In fact, ranges would almost certainly have to  
22 be accepted, right, because it would be hard to do this  
23 with exactitude?

24          A. Well, I think that it would be no more  
25 difficult for a finder of fact to evaluate the odds

1     than it is for each party to evaluate its odds. The  
2     finder of fact has the benefit of the record. So, I  
3     guess no, except to the extent I do think it's  
4     difficult for the parties to evaluate their odds.

5           Q. You think it's exactly the same for a finder of  
6     fact to try to determine the objective odds as for the  
7     parties subjectively to assess their chances of  
8     winning? You think those are the same thing?

9           A. I think it's actually in some respects easier  
10    for the finder of fact, because he or she doesn't bring  
11    a lot of baggage to it.

12          Q. So, you say the finder of fact, you're  
13    proposing that the antitrust judge actually try the  
14    patent case. Is that what you're suggesting?

15          A. No, I'm suggesting that the finder of fact  
16    evaluate the evidence from the patent case and come to  
17    his or her conclusion about what the odds were, and it  
18    may be sufficient for him or her to reach a decision  
19    regarding ranges, depending on what the settlement is.

20          Q. Well, essentially, though, Doctor, what you're  
21    suggesting is putting all the evidence from the patent  
22    case in front of the antitrust judge and having the  
23    antitrust judge make a determination of the odds. Is  
24    that correct?

25          A. I'm suggesting putting whatever evidence the

1 fact finder thinks he or she needs in order to come to  
2 a determination of the likely outcome of the  
3 litigation, and if that is all of the patent evidence  
4 that he or she believes they need, then so be it, but  
5 whatever they think they need to do the job.

6 Q. And how is the fact finder supposed to  
7 determine what he or she thinks the fact finder needs  
8 in order to do the job?

9 A. I think that's something that becomes -- I'm  
10 not an expert in legal procedures, but I'm assuming  
11 that that's something that becomes apparent as you go  
12 forward with the job.

13 Q. Well, it is your test, Doctor, so I'm sort of  
14 curious as to exactly how you sort of envisioned it  
15 functioning. I understand you're not a lawyer, but  
16 nonetheless, I would like to know exactly how you  
17 envision that the fact finder would go about making  
18 this sort of determination.

19 A. Well, this was definitely for the application  
20 in this case an academic exercise, because the monopoly  
21 power test was the place where I stopped doing any of  
22 my own analysis, but I would assume that what the fact  
23 finder would do would be to look at the evidence in the  
24 record and come to some determination as to what he or  
25 she thought the likely outcome of the litigation was.



1           Q. So, you would like the antitrust judge to take  
2 a look at all the evidence in the patent record,  
3 however extensive that record was, and parse through  
4 that and essentially retry the patent case. Isn't that  
5 right?

6           A. Well, the patent case --

7           Q. Try the patent case since it wasn't tried the  
8 first time.

9           A. Right, the patent case was not tried, and I --  
10 and I'm not sure that I have anything to add to what  
11 I've already testified, which is that I think that's up  
12 to the fact finder, how much they think they need in  
13 order to come to that determination.

14          Q. I take it in reaching that conclusion or  
15 putting that material in front of the fact finder, that  
16 you wouldn't care about the contemporaneous evaluations  
17 of the parties of the patent suit. Is that right?

18          A. I think the point here is that -- and this goes  
19 back to my concern with Professor Bresnahan's test --  
20 is that at the end of the day, you've -- you want to  
21 establish what the effect of the agreement is, and in  
22 order to establish the effect of the agreement, you  
23 want to look at the objective facts. So, while  
24 economists always want to look at more data, I think  
25 the real data you want to look at here is what is the

1 objective evidence? What's the evidence telling you?

2 Q. And in your test, what you would have the fact  
3 finder do is look at everything that was available in  
4 the patent case. Is that right?

5 A. Again, all I can say is what I've said before,  
6 which is that's up to the fact finder to determine how  
7 much he or she needs, how much he or she thinks he or  
8 she needs to come to a determination.

9 Q. And that's how your test would work; the fact  
10 finder would have to determine how much he or she  
11 needs?

12 A. Yeah, again, I mean I think we're varying into  
13 an area which is not necessarily my expertise, which is  
14 legal procedure, but -- but I think it's up to the fact  
15 finder.

16 Q. Of course, as a nonlawyer, you've never --  
17 strike that.

18 As a nonlawyer, you don't consider yourself  
19 qualified to assess litigation odds, do you?

20 A. I've never been called upon to assess  
21 litigation odds. I have no experience with it.

22 Q. Okay. And in fact, you don't even know what  
23 information you'd need to make that kind of assessment,  
24 do you?

25 A. Beyond knowing that it would be evidence in the

1 record of the case, I don't know anything more specific  
2 than that.

3 Q. And if the case hadn't been tried and therefore  
4 there was no formal record, then how would your test  
5 work, sir?

6 A. By "formal record" now, do you mean a courtroom  
7 record?

8 Q. That's correct.

9 A. Well, I would certainly assume that the parties  
10 would have gathered a lot of evidence on each side, and  
11 even if that evidence were never presented in a  
12 courtroom, there would be -- I assume there would be  
13 deposition testimony, there would be exhibits, there  
14 would be documents. I would assume the sorts of things  
15 the parties were putting together to present their case  
16 would be exactly the kind of record you'd be looking  
17 for. But now I understand that "record" may have a  
18 technical meaning as being something generated from a  
19 court, and I don't necessarily mean that.

20 Q. Some of those documents and some of that  
21 deposition testimony might not be admissible into a  
22 formal record. Isn't that right?

23 A. I really don't know about legal standards for  
24 admissibility.

25 Q. How about issues like demeanor and credibility,

1     those couldn't be taken into account on the kind of  
2     record you describe.  Isn't that right?

3           A.  Well, I guess there's no reason why you would  
4     preclude there being live testimony on any of the  
5     patent issues if that were considered to be an issue.  
6     I must confess that we're -- I'm not an expert on  
7     courtroom procedure or legal procedures, but I'm  
8     answering this as much as a --

9           Q.  Well, I understand.  It is your test, so I'd  
10    like to see what you have in mind for this.

11           So, your test might envision essentially  
12    retrying -- I won't say retrying -- might envision  
13    actually trying the patent case.  Isn't that right?

14           A.  Well, again, I think if a finder of fact felt  
15    that he or she needed to get live testimony on one or  
16    other issues, they could certainly -- they could  
17    certainly do that.

18           Q.  Let me ask you this, sir:  Prior to the  
19    settlement, the strongest advocate for the strength of  
20    Upsher's patent case was Upsher, right?

21           A.  Well, certainly of the two parties, they would  
22    be the advocate of Upsher's case.

23           Q.  Right.  And Schering would be the strongest  
24    advocate for Schering's position?

25           A.  Of the two parties, that's right.

1           Q. Right. Now, after the case was settled, if one  
2           is looking at it after the fact, isn't it true that at  
3           that point, no one would really be prepared to  
4           affirmatively advocate Upsher's case? Haven't the  
5           incentives changed, in other words?

6           A. Yes, but it's not clear to me that the record  
7           that you've got is affected one whit by that. I mean,  
8           you have got deposition testimony, you have got  
9           exhibits, you've got documents, and those I assume  
10          are -- those predate any putative change in incentives.

11          Q. But we are, what, now five years after the  
12          fact. Is that right, Dr. Addanki?

13          A. Almost, four and a half.

14          Q. Right. And there's no obligation on anybody as  
15          far as you know to keep any of those documents around,  
16          is there?

17          A. I have no idea what the obligations are  
18          legally.

19          Q. And in fact, the incentive that both of the  
20          parties have right now is to support the settlement.  
21          Isn't that right?

22          A. Well, certainly to support the settlement to  
23          the extent that they, you know, are still remaining  
24          within the law and, you know, being -- being generally  
25          good citizens, yes.

1           Q. Let's talk about a prescription drug that has a  
2 patent that doesn't expire for ten years. If you're  
3 looking at the economic value of that patent on a  
4 year-by-year basis, don't more and more uncertainties  
5 creep in as you go farther down the line?

6           A. Let me make sure I understand the question. If  
7 you're standing here in the year 2002 and you've got a  
8 patent expiring in 2012 and you're assessing, what, the  
9 returns from the patent?

10          Q. The returns from the patent, the value of the  
11 patent.

12          A. Well, the value of the patent is your  
13 discounted stream of returns from the patent, all  
14 right, so that is, in fact, you know, changing over  
15 time, and even as you stand here today, you can view it  
16 as changing over time, but at any given point --  
17 standing here in 2002, my uncertainty about what the  
18 patent will be worth in 2005 embodies the same sort of  
19 uncertainty and indeed the same physical uncertainty as  
20 is embodied in my valuation of the patent today as of  
21 today, because when you think about it, it's a  
22 discounted stream of returns, and the returns beyond  
23 2005 are as uncertain if you're evaluating the value of  
24 the patent today as they are if you're evaluating the  
25 patent as of 2005.

1           Q. Well, maybe we're talking a little bit at  
2 cross-purposes, Doctor. That's not exactly what I had  
3 in mind.

4           Let me ask you this: It's not uncommon for a  
5 new drug to be developed that might eat into the demand  
6 for a preexisting patented drug, right?

7           A. It could happen, yes.

8           Q. Okay. And it could also happen that a  
9 noninfringing A-B generic came on the market, isn't  
10 that right, that could also eat into the demand for the  
11 patented drug?

12          A. That could happen.

13          Q. Okay. And those sorts of things would shorten  
14 or affect the long-term economic value of the patent,  
15 right?

16          A. Maybe we're talking at cross-purposes and maybe  
17 I just don't understand your question.

18          Q. Okay, let me withdraw it and find out.

19                 What I'm driving at here, Doctor, is that the  
20 later years of a patent, due to things like, for  
21 example, development of a noninfringing A-B generic or  
22 the development of a new patented drug that was  
23 innovation, those things might mean that the patent  
24 down the road in its later years wasn't worth very  
25 much, right?

1           A. The patent would always be worth less in its  
2 later years than it would be worth now. That's always  
3 true, because there's fewer years left.

4           Q. I understand.

5           A. Now, if there's uncertainty in the future --  
6 and there is uncertainty in the future, there is no  
7 question -- if there is uncertainty in the future, that  
8 affects the value today, the value tomorrow, the value  
9 the year after next and so on. So, maybe I'm --

10          Q. Well, I guess the uncertainty that I'm talking  
11 about is more than just the value of money in a  
12 discounted stream. What I'm talking about is the  
13 possibility, for example, that a new product might come  
14 in that would completely supplant the patented drug so  
15 that even though it has a ten-year patent duration, in  
16 fact, after year seven, it turns out the patented drug  
17 was worthless. Do you follow me?

18          A. Yes, but why would that -- I guess I don't  
19 understand why that wouldn't affect the patent -- why  
20 that probability wouldn't affect the value of the  
21 patent today.

22          Q. Well, I -- I'm actually more interested in the  
23 term than the value today, and maybe that's where we  
24 are talking at cross-purposes, because what I want to  
25 try to discuss with you today is going back to our



1     hypothetical of the -- of a ten-year duration of a  
2     patent in our hypothetical case, suppose, in fact, it's  
3     known that -- to the parties that after five years, a  
4     new product is being developed and will likely supplant  
5     the patented drug, okay?

6             In that situation -- have you ever heard that  
7     term referred to as the economic life of a patent, the  
8     fact that a patent might be at some point essentially  
9     outmoded?

10            A. I may have heard the term. It's fairly loose  
11     talk. I mean, it's fairly loose speech. It's -- it  
12     can certainly be the case that the owner of a patent  
13     decides that they're not going to exploit it in some  
14     way, either exploit it by licensing or exploit it by  
15     selling a product covered by that patent at some point.  
16     Does that mean that the economic life of the patent has  
17     ended? No, I think it's a -- I think it's difficult to  
18     know exactly what one means by the "economic life of a  
19     patent," because a patent is, really more than anything  
20     else, an option. It's an option to exclude someone  
21     from doing something.

22            Q. Well, let's take my hypothetical situation  
23     where there are ten years remaining on a patent, and if  
24     the litigation odds -- we can somehow independently  
25     ascertain that the litigation odds are 50/50, okay?

1 Now, if one applied that in a pure expected value  
2 weight of the patent, one would say five years would be  
3 the break point, right?

4 Okay, that's a yes?

5 A. Yes.

6 Q. Okay. Now, let's further suppose that parties  
7 reach a settlement with a reverse payment, and the  
8 settlement entry date is four years, okay? Are you  
9 with me?

10 A. Yes.

11 Q. All right. In that hypothetical, judged by  
12 your test, that would look to be a pro-competitive or  
13 at least not anti-competitive result, correct?

14 A. I want to pause for a second. In the case of  
15 the simple example that I put up, which was really an  
16 example for illustrative purposes, that's correct, but  
17 that example does not take into account discounting,  
18 but that's --

19 Q. I'm sorry, does not take into account?

20 A. Discounting.

21 Q. Discounting.

22 A. But discounting is a relatively easy thing to  
23 put in, as I think your witness Professor Bresnahan has  
24 testified to as well. So, in terms of this example,  
25 yes, that's right, but that's an example without

1       discounting.  It's an example --

2           Q.  Okay, well --

3           A.  -- it's just an example to bring out  
4       pedagogically the point we're getting at here.

5           Q.  Well, let me talk about my example and then we  
6       can talk about discounting if it appears to be  
7       relevant, and again, just to clarify, we're assuming  
8       market power for purposes of this discussion, right?

9           A.  We're assuming monopoly power, right.

10          Q.  Monopoly power.

11                 Now, let's suppose that the parties are aware  
12       that a new product is right around the corner, and that  
13       new product will be on the market in six years and at  
14       that point essentially will draw away all the demand  
15       from the patented drug, okay?  Are you with me?

16          A.  Keep going.  I mean, I have a problem, but keep  
17       going.

18          Q.  Okay, okay.  And my question was, the parties  
19       had settled at four years with a reverse payment.  On  
20       the analysis that you and I did a few moments ago, five  
21       years would seem to be the appropriate date, and  
22       therefore, the number of a four-year entry date would  
23       appear to be pro-competitive, but in fact, if one knew  
24       that the real or economic life of the patent was only  
25       six years, the true entry date or the odds applied to

1     what we now know is the appropriate term of the patent,  
2     the economic term, would yield a three-year result.  
3     So, our four-year settlement would look to be  
4     anti-competitive. Is that right?

5           A. If everyone knew, in fact, that that's exactly  
6     what was going to go on, then I have another matter in  
7     my head, but I can certainly conceive of a situation  
8     where if you had knowledge that the tail end of the  
9     patent would involve, say, fewer sales by the patented  
10    product, then it could be, yes, it could be that --

11          Q. Okay, okay.

12          A. -- it's as you say.

13          Q. Okay. And in that situation, if the parties  
14    had this knowledge and if the Government had the burden  
15    of proof and didn't have this knowledge, then it would  
16    inure to the parties' benefit to continue to espouse a  
17    ten-year term, would it not, because that would make  
18    the five years compared to the four years agreed to  
19    look more reasonable?

20          A. I think I'm having a little difficulty  
21    understanding what you mean by your question. Let me  
22    put it this way: Are you asking that the parties would  
23    have some incentive to -- to not introduce or to not --  
24    to suppress knowledge about this other product?

25          Q. Right, that the parties in justifying their

1     agreement after the fact would certainly not be  
2     expected to be trumpeting to the Government  
3     investigating the matter that, in fact, the patent  
4     really had an economic life of six years. They would  
5     be coming in suggesting the economic life was ten  
6     years, wouldn't they?

7           A. Frankly, I don't think the Government or the  
8     parties are going to either be looking for or  
9     generating documents that talk about what the economic  
10    life of a patent is. I think what you're really  
11    looking for is the parties' understanding of what was  
12    going to happen in the market, and I would suspect -- I  
13    would suppose that if the parties believed that there  
14    were going to be other products that would take sales  
15    away, then that would be in the parties' documents.

16          Q. Well, I agree with you, Doctor, that what would  
17    be key would be the parties' understanding, but the  
18    fact is, we would have to get that from the parties,  
19    wouldn't we?

20          A. Well, that's what we've got the documents for.

21          Q. Well -- and indeed, if that wasn't clearly  
22    reflected in the documents, you'd have to rely on  
23    testimony from the parties. Isn't that right?

24          A. Well, you'd rely on testimony from the parties  
25    and the documents from the parties, but it seems to me

1     that especially given the Government's powers, that you  
2     could also look to other industry participants to get  
3     that information, and there is no reason why you would  
4     be restricted to the parties in the case, as you  
5     frequently go out in your investigations to look to  
6     what other people in the industry are saying,  
7     customers, competitors.

8           Q.   And those other people in the industry may or  
9     may not have the relevant information, right?

10          A.   Well, someone's got to know.  There's a product  
11     that's going to come in.

12          Q.   Well, for sure someone has to know, and the  
13     people who are most knowledgeable are apt to be  
14     certainly the patentee and presumably also the company  
15     coming in with an A-B generic.

16          A.   Right, but if it's one of the -- if it's one of  
17     the parties to the case, then their documents -- if  
18     they're going to introduce a product, then their  
19     documents will say something about it.  I mean, I can't  
20     imagine their having a product in the pipeline and  
21     saying nothing about it in the documents.  If it's not  
22     them, then it's going to be in the third-party  
23     documents.  So, I guess I'm just not sure whether it  
24     isn't an empty box.

25          Q.   The question is, if the burden is on the

1 Government, then the Government stands or bears the  
2 risk of trying to establish exactly what the true facts  
3 are, whether it's an empty box or not, right?

4 A. Well, if the Government has done the right  
5 monopoly power test, the Government may never get to  
6 this, right?

7 Q. Let's assume, Doctor, that you and the  
8 Government differ on the application of the monopoly  
9 power test --

10 A. It's clear that we do.

11 Q. -- and therefore we get to this. In that  
12 situation, isn't it true that trying to ascertain the  
13 economic life of the patent would be a rather difficult  
14 burden to expect the Government to bear?

15 A. What is at issue here is simply figuring out  
16 who's got a product in the works, and that's something  
17 you folks do all the time in merger investigations.  
18 You're looking into entry and who's got a product that  
19 might be coming in. So, I just fail to see why this is  
20 in some sense more -- inherently more difficult than  
21 what the Government does routinely.

22 Q. So, you think looking six to ten years down the  
23 line is what the Government does routinely?

24 A. Well, I can certainly think of situations where  
25 the Government has asked for and received documents

1       pertaining to entry several years into the future.

2           Q.   Several years?

3           A.   Six, seven.

4           Q.   Do you know a case where the Government has  
5       asked for entry documents seven years into the future?

6           A.   Documents about new products, products in the  
7       pipeline.

8           Q.   All right, Doctor, let me ask you this:  If the  
9       size of the reverse payment was so large that there was  
10      no valid reason why anyone would make a payment of that  
11      size, in that situation, would you be willing to  
12      circumvent the rest of your test, the rest of your  
13      analysis, and assume the payment was anti-competitive?

14          A.   Let me put it this way:  This -- clearly you're  
15      going to let -- one is going to let common sense guide  
16      one.  So, if there was a billion dollars being paid for  
17      a -- for -- as part of a settlement involving a market  
18      with \$50 million in sales, you don't have to look any  
19      further.  Something's wrong.

20                But beyond the obvious ones like that, it seems  
21      to me there is no particular guidance from economic  
22      theory as to exactly where you should start worrying.

23          Q.   But do you agree with the basic principle that  
24      if the size of the reverse payment was so large that  
25      there was no valid reason why anyone would make a



1 payment of that size, that under those circumstances  
2 you would be willing to forego the rest of your test?

3 A. I think in principle, that's right.

4 Q. Okay. How about a \$60 million payment that was  
5 made under circumstances where hypothetically the  
6 evidence demonstrated that a payment of zero would  
7 ordinarily have been anticipated, would that meet your  
8 test?

9 MR. SCHILDKRAUT: Objection. I think this  
10 question is vague. I don't understand "zero would  
11 ordinarily have been anticipated" within the  
12 circumstances.

13 JUDGE CHAPPELL: Do you understand the  
14 question?

15 THE WITNESS: I think I need some more detail  
16 in the question, sir, but --

17 JUDGE CHAPPELL: Sustained.

18 BY MR. ORLANS:

19 Q. Let's assume, Doctor, that a payment of \$60  
20 million was made for assets that it was established  
21 were worth zero to anyone else under similar  
22 circumstances. In that situation, would you agree that  
23 you wouldn't have to do the rest of your test in order  
24 to conclude that that payment was anti-competitive?

25 A. Okay, I think I've got your question on board,

1 but I want to be sure I understand it. \$60 million was  
2 paid. Someone has established, looking at all the  
3 facts and looking at all the assets that were  
4 transferred for that \$60 million payment, that no one  
5 else would have paid a penny for them.

6 No, I think it depends on what it was worth to  
7 Schering, because this is a bargaining situation, and  
8 when two people sit down across the bargaining table  
9 from one another, they end up somewhere between the two  
10 parties' reservation prices.

11 Q. Let me direct you, Doctor, to your deposition  
12 testimony, and I'm looking at -- and it's in your  
13 volume at Volume 2, tab 1, page 160, beginning at line  
14 3. Didn't you testify as follows:

15 "QUESTION: Is the size of the payment a  
16 relevant consideration in assessing the competitive  
17 effects of the settlement agreement?

18 "ANSWER: If you had a payment that was so big,  
19 you would say, look, I really can't think of any  
20 reasons why someone would make a payment of that size.  
21 There may be situations where you would say, I don't  
22 need to spend a lot of time looking at this, you know,  
23 I can't tell you offhand exactly what the situation  
24 would be, but I can certainly conceive of that."

25 Wasn't that your testimony?

1           MR. SCHILDKRAUT: Objection, this is improper  
2           impeachment. This is not inconsistent with anything  
3           that Dr. Addanki said.

4           MR. ORLANS: I think it clearly is, Your Honor.  
5           He's clearly walking back on this, and I'd like to  
6           establish that.

7           THE WITNESS: Your Honor, I think I testified  
8           pretty clearly that if you had someone paying a billion  
9           dollars and it was a market involving \$100 million in  
10          sales, that you really wouldn't have to look any  
11          further.

12          JUDGE CHAPPELL: I'm going to overrule the  
13          objection. We already have an answer. I'm not  
14          agreeing that it's inconsistent, though.

15          BY MR. ORLANS:

16          Q. So, Doctor, in your view, this exception that  
17          you were talking about applies to a billion dollars but  
18          not to \$60 million. Is that right?

19          A. That's not what I testified to. What I said  
20          was the way you set up your hypothetical, you had said  
21          that if no one else would pay a penny for these assets  
22          for which someone paid \$60 million, does that tell you  
23          that there has been a payment for which you need to  
24          look no further to establish its effect, and I said in  
25          the first place, that -- the hypothetical you set up

1 doesn't tell you anything about what the assets were  
2 worth to the person paying, and that was the first  
3 thing that I said actually. So, I'm not sure I see  
4 what conclusions you're drawing from my testimony.

5 Q. Okay, we will move on, Doctor.

6 There are two possibilities here, right, either  
7 the patent case -- or let's talk about a hypothetical  
8 situation.

9 The patent case could settle anyway, and by  
10 anyway, I mean without a reverse payment, meaning that  
11 it will settle as most cases do, or it won't settle, in  
12 which case various other options could occur, including  
13 a reverse payment, right? A fair beginning to set out  
14 those two options?

15 A. Okay.

16 Q. Okay.

17 A. Or it could litigate.

18 Q. Well, that's part of option two, I think, a  
19 case that wouldn't settle, and then we will discuss  
20 that in a moment.

21 A. I see.

22 Q. But sure, in the second situation where it  
23 doesn't settle, there are various options, one of which  
24 would be to litigate, okay?

25 A. Okay.

1           Q. If the case would settle anyway -- and we've  
2 established that most cases do, right?

3           A. I think it's true that the majority of the  
4 cases do not go to trial, that's correct.

5           Q. And in fact, the majority of patent cases  
6 settle without reverse payments, since you don't know  
7 of any other reverse payment situations, right?

8           A. Do most patent cases settle without someone  
9 writing someone -- the patentee writing someone a  
10 check? I think that's probably true.

11          Q. Okay.

12          A. But just to finish that answer, but I think it  
13 is certainly my experience that many patent cases do  
14 settle with settlements that involve cross-licenses or  
15 licenses to patents other than the one being litigated.

16          Q. I understand.

17          A. And there may be consideration going both ways  
18 in those side agreements.

19          Q. Right.

20          A. I just want to be clear what we're talking  
21 about.

22               MR. SCHILDKRAUT: Objection, Your Honor, we  
23 ought to let the witness finish his answer. I think he  
24 did, but --

25               MR. ORLANS: I think he did, too.

1 THE WITNESS: Yes.

2 JUDGE CHAPPELL: Thank you.

3 BY MR. ORLANS:

4 Q. Now, if a reverse -- strike that.

5 In a situation where the case would have  
6 settled anyway, by definition, a reverse payment  
7 wouldn't be necessary in order to settle the case,  
8 correct?

9 MR. SCHILDKRAUT: Objection, Your Honor. This  
10 was asked and answered yesterday, and I remember it  
11 very specifically, because I was painfully overruled on  
12 it being relevant.

13 JUDGE CHAPPELL: You are -- are you placing  
14 your witness or merely replowing old ground?

15 MR. ORLANS: I think I am going into a somewhat  
16 different area, Your Honor. It's only one question and  
17 will be the basis for some others.

18 JUDGE CHAPPELL: I suppose I'll painfully  
19 overrule you again. You may proceed.

20 MR. ORLANS: And I'm sure he will painfully  
21 remember that.

22 JUDGE CHAPPELL: Do you need her to read the  
23 question?

24 MR. ORLANS: Why don't you reread it.

25 THE WITNESS: That's fine, thank you.

1 (The record was read as follows:)

2 "QUESTION: In a situation where the case would  
3 have settled anyway, by definition, a reverse payment  
4 wouldn't be necessary in order to settle the case,  
5 correct?"

6 THE WITNESS: If you're saying -- and I want to  
7 be sure that this is what you're saying -- if you're  
8 saying that if the parties could have settled without a  
9 payment, then a payment wasn't necessary to settle, I  
10 can't argue with that.

11 BY MR. ORLANS:

12 Q. I would think that would be a difficult  
13 proposition argument.

14 A. That's fine.

15 Q. And let me go one step further now and ask you  
16 whether it isn't also true that if a payment were made  
17 in such a case, the entry date would necessarily be  
18 later than the entry date that would have been agreed  
19 upon without the payment?

20 A. Where the only difference between the two  
21 settlements were -- this is a tough one, because the  
22 fact is that parties get what they negotiate. So, the  
23 difference between the two settlements is that on one  
24 side, the patentee wouldn't roll over and give them the  
25 money, and on the other side, the patentee rolled over

1 a little bit and gave them some money. I don't think  
2 you can establish one way or another, unless you know  
3 what that other settlement was going to be, that it  
4 would have any effect on the entry date.

5 In other words, it's a negotiating situation,  
6 and it's a hypothetical settlement you're comparing  
7 against a real settlement, and given the -- the  
8 latitude that exists in any negotiating situation as to  
9 what the final outcome's going to be, I don't think  
10 that follows.

11 Q. Well, corporations are economically rational,  
12 aren't they, Doctor?

13 A. At some level, yes.

14 Q. Okay.

15 A. There's a wealth of literature about how  
16 rational and how bounded their rationality is, but --

17 Q. If the corporations would have settled for  
18 entry date X without a payment, doesn't it stand to  
19 reason that they'll move the date back with a payment?

20 A. Which is an entirely different question from  
21 the hypothetical question you asked me. In other  
22 words, if you really -- and this we talked about on  
23 Thursday, Your Honor. If you had a settlement which  
24 said entry January 1, 2000, no payment, and that was a  
25 settlement the parties were going to sign, I think it's



1 fair to say that if they were then going to go to a  
2 settlement where patentee paid \$10 million or \$100  
3 million, that the patentee would say, well, we are not  
4 going to have January 1, 2000 then, right, if that were  
5 true.

6 But when you're talking about a hypothetical  
7 settlement against an actual settlement, the answer's  
8 got to be I don't know. I don't know if the entry date  
9 would have been any different.

10 Q. All right, let me ask you this, Doctor: Let's  
11 go to the situation where our case hasn't settled. In  
12 that situation, a couple of things are -- more than a  
13 couple of things are possible. One is that over time  
14 maybe the parties would adjust their expectations and  
15 nonetheless be able to settle, right? That's one  
16 possible option, but since we're assuming there's no  
17 settlement here, another option would be litigation,  
18 and a third option perhaps would be a settlement with a  
19 reverse payment. Are you with me?

20 A. Among possibly a raft of other options, yes.

21 Q. Okay, let's think about this in terms of what  
22 we call the resistance dates; that is, the date that  
23 the brand brings to the table as essentially the  
24 earliest possible date that it would permit generic  
25 entry and the date that the generic brings to the table

1 as sort of the latest possible date it would accept,  
2 okay?

3 A. Well, you're talking about the dates that  
4 they're saying or the dates that they really believe?

5 Q. The dates that they really believe.

6 A. Okay.

7 Q. Okay? That's -- we've used that -- called that  
8 a resistance date. Is that acceptable to you?

9 A. Yeah, it's not -- it's more like a reservation  
10 date, but if you want to call it a resistance date --

11 Q. Oh, reservation date if that's a better term,  
12 sure.

13 And what we're talking about here is a  
14 situation where the -- there's a gap between the  
15 reservation dates, right? In other words, the brand  
16 says I'm not going to let anybody in any earlier than  
17 six years, so if they want earlier than six years,  
18 we're litigating, but I'll let them in after six years,  
19 and the generic says, I'd like to go in four years or  
20 earlier, but if they push any later than that, I'm  
21 going to litigate, okay?

22 Now, is that -- that's what we're talking about  
23 as a situation that on the face of it wouldn't settle,  
24 right?

25 A. So far, yes.

1           Q.   Okay.  And again, one option, although we're  
2   going to dismiss it out of hand, is the possibility  
3   that those resistance dates or reservation dates would  
4   be adjusted and maybe they could reach some  
5   accommodation, but putting that aside, another  
6   possibility is that this could be litigated to a  
7   conclusion, right?

8           A.   Yes.

9           Q.   And if the generic wins the litigation, it  
10   could enter immediately, and that would be  
11   pro-competitive in your view.  Is that right?

12          A.   No, I think what that does is get you to the  
13   fact that there's going to be generic entry, but to  
14   reach any ultimate conclusion on pro-competitiveness  
15   with generic entry, you do have to get involved with  
16   step three.

17          Q.   Okay.  So, you'd still want to look at  
18   commercial activity, even in that situation?

19          A.   Well, to assess the question of whether generic  
20   entry was pro-competitive, you would have to look at  
21   that, yes.

22          Q.   Would you suggest, Doctor, that if a patent  
23   case actually was litigated to a conclusion and the  
24   generic won that the generic entry as a result of that  
25   litigation could conceivably be anti-competitive and

1       actionable -- anti-competitive? Strike actionable.

2           A. No, I didn't say it was going to be  
3       anti-competitive.

4           Q. I see.

5           A. I said it's the consumer benefit that you would  
6       want to look at.

7           Q. I see. So, the third part of your test where  
8       you're talking about consumer benefit, that's really  
9       not a conclusion that the activity is anti-competitive;  
10      you're making some more general welfare conclusion. Is  
11      that right?

12          A. Well, yes, it is -- it is ultimately what  
13      the -- you know, what the question resolves itself  
14      into, are consumers better off? That's the ultimate  
15      question, but it's not couched in terms of is it  
16      anti-competitive even if it doesn't improve consumer  
17      welfare.

18          Q. So, again, to try to get a handle on your test,  
19      if someone fails the monopoly power screen and if we  
20      could somehow assess the entry date under litigation  
21      and conclude that it failed that test as well, without  
22      needing to get to your third element, would we be able  
23      to conclude based on elements one and two that the  
24      conduct was anti-competitive?

25          A. I think you couldn't conclude as to what its

1 effects were until you did the third part.

2 Q. Well, you have me confused. I'm trying to  
3 assess whether the third step, which is comparing  
4 promotions and making some general welfare-enhancing or  
5 non-enhancing conclusion, whether that is or is not  
6 part of your conclusion that a particular settlement is  
7 anti-competitive.

8 A. I think the point is, is it output-reducing in  
9 its effects? That's the ultimate point, and that's the  
10 part where the third prong of the test comes in,  
11 because you've really got -- and I don't want to sort  
12 of repeat it at length, because you have heard it from  
13 me a couple of times. It is how do these  
14 potentially -- these opposite and potentially  
15 offsetting effects resolve themselves and end up with a  
16 net result? And that net result is the effect, and  
17 it's an anti-competitive effect assuming it's  
18 output-reducing, and the way that I would express it is  
19 if the -- if the net result was that such  
20 demand-expanding activities as were curtailed didn't  
21 more than compensate for the output effect of reduced  
22 competition in the product market, then I'd say it's  
23 anti-competitive in effect.

24 Q. So, you're telling me that if the generic did,  
25 in fact, proceed to litigation and win the patent

1     litigation, that might in your view be anti-competitive  
2     because of that third prong of your test. Is that  
3     right?

4           A. No, that's exactly the opposite of what I just  
5     said. I think if the generic didn't come in, right, or  
6     if generic entry was delayed in some sense, going back  
7     to the earlier thing, you may be able to conclude that  
8     there was less price competition in the marketplace,  
9     but what you can't conclude until you look at the  
10    weighing up of the effects is whether there was a  
11    change in the other demand-building activities that was  
12    big enough to offset the effect of the change in price  
13    competition, and if it wasn't, then you conclude that  
14    it was anti-competitive. Is that clear?

15          Q. Well, I think it's clear, although it still  
16    seems to me that you're suggesting that that would be  
17    an effect that you would have to consider whenever the  
18    generic entered. Is that right?

19          A. You know, when you say "consider," I'm not sure  
20    -- consider for what? I mean, if the generic enters,  
21    it's not clear to me that there's any evaluation you  
22    have to make as to something being anti-competitive or  
23    not. So, I'm not sure we're not talking at  
24    cross-purposes.

25          Q. Okay, let's go on to the third possibility. We

1 have talked a little about litigation, talked about the  
2 possibility of settlement. The third possibility is a  
3 reverse payment.

4 Now, tell me this, Doctor: Would you agree  
5 that if a reverse payment were made, that the date  
6 would necessarily be later than the brand's reservation  
7 date?

8 A. Yes.

9 Q. And the reason for that, for those having  
10 followed along -- and it took me a long time to get to  
11 this point -- is the brand comes into this situation  
12 saying that the reservation date is the earliest  
13 possible date it would permit generic entry, and any  
14 earlier than that, it would litigate, and any later  
15 than that would be fine. Obviously if the brand is  
16 going to be willing to -- excuse me, and the generic  
17 goes kind of the other way, and obviously, therefore,  
18 since the brand would have been willing to accept its  
19 reservation date for settlement, if it's going to pay  
20 as well, it would push beyond that date, right?

21 MR. SCHILDKRAUT: Objection. There are  
22 probably two or three questions in there, so a compound  
23 question.

24 MR. ORLANS: All right, I'll try to reframe it.

25 BY MR. ORLANS:

1           Q. The brand comes into this negotiation with a  
2 reservation date, which is the earliest possible date  
3 at which it would accept for settlement purposes  
4 generic entry, right? That's what we've defined as the  
5 reservation date.

6           A. That's correct.

7           Q. Okay. And since it's willing to accept that  
8 date, if it's going to pay money as well, it would  
9 expect to get a later date than its reservation date,  
10 which was the date it would offer without any payment  
11 of money, correct?

12          A. Right. We don't know how much later, but  
13 later.

14          Q. Right, okay. If reverse payments were freely  
15 permitted, don't you agree that a large percentage of  
16 settlements would likely include them?

17          A. Tell me what you mean by "freely permitted."

18          Q. Well, if there were no legal constraints, no  
19 antitrust ramifications from making a reverse payment.

20          A. And by that do you mean that the Government  
21 would simply say that a reverse payment cannot be  
22 challenged by a private or public party?

23          Q. Essentially, yeah, either it would say that or  
24 it would find that as a practical matter it was unable  
25 to do that, so either way, there were no legal



1        ramifications to making a reverse payment.

2            A. Well, the -- but those are very different  
3 things. I mean, it would be one thing for the  
4 Government -- for Congress to pass a law saying that  
5 you couldn't sue someone on antitrust grounds if there  
6 were a reverse payment in their license agreement and  
7 quite another thing for the Government to find that,  
8 you know, it had to prove anti-competitive effect if it  
9 was going to find -- if it was going to successfully  
10 challenge a settlement that had a reverse payment.

11          Q. All right, well, I'm agnostic to those, Doctor,  
12 but let's take the cleaner one. Let's say it was off  
13 the board, that Congress had concluded that reverse  
14 payments couldn't be challenged, they were perfectly  
15 legal. In that situation, wouldn't you agree that  
16 you'd see an awful lot of reverse payments?

17          A. If it were legal to have reverse payments, then  
18 you certainly would expect to see them more, yes, if it  
19 were legal in that sense as a blanket immunity from any  
20 kind of antitrust threat.

21          Q. Doctor, you found no evidence of anyone from  
22 Schering saying that we moved the entry date a certain  
23 amount because we were risk averse. Isn't that right?

24          A. I don't recall ever seeing any business person  
25 saying I did thus and such because I'm risk averse in

1 my 17 years of consulting.

2 Q. So, the answer is that you didn't see that.

3 A. Yeah, people don't write like that.

4 Q. And you haven't empirically measured or  
5 assessed the extent, if any, of risk aversion of any of  
6 the parties here, have you?

7 A. Do you mean quantitatively? I have not  
8 quantified either side's risk aversion, although I have  
9 assessed Schering's qualitatively.

10 Q. I'm sorry?

11 A. Qualitatively.

12 Q. And you haven't quantified the extent, if any,  
13 that risk aversion affected the terms of the settlement  
14 here, correct?

15 A. I have not quantified that.

16 Q. Did you conduct any systematic, scientific  
17 evaluation of Schering that would provide a basis for  
18 you to conclude that Schering is risk averse?

19 A. Yes.

20 Q. Well, I know you looked at a few documents,  
21 Doctor, but are you suggesting to me that you really in  
22 some scientific way evaluated risk aversion here?

23 A. Well, let's be clear. I did not make a  
24 quantitative assessment of risk aversion, but starting  
25 with the premise, which is a pretty well accepted

1 premise in economics, that people and managers are risk  
2 averse, what was really important here was to  
3 ascertain, was to confirm, that there was no reason to  
4 suppose that Schering, just for some hitherto unknown  
5 reason, would be an exception to that general  
6 principle, and so the investigation involved was one of  
7 establishing that, in fact, they are like other  
8 corporations. They are pretty risk averse, especially  
9 if they stand to lose in the industry.

10 Q. And subjectively you reviewed a couple of  
11 documents and came to that conclusion. Is that right?

12 A. I reviewed them pretty objectively.

13 Q. Okay.

14 A. I also spoke to people. Documents and people,  
15 yeah.

16 Q. If the generic were risk averse -- well, let me  
17 come back to that actually before I ask this question.

18 You said you spoke to people. Did you in some  
19 systematic way speak to all the negotiators and all the  
20 people in high management? How did you decide who to  
21 speak to?

22 A. I didn't speak to the negotiators of this  
23 agreement, but I did speak to people who make  
24 investment decisions for Schering. I spoke to people  
25 who are in -- I think the treasurer of Schering and a

1 couple other people.

2 Q. Wouldn't the views on risk aversion and  
3 propensity toward risk aversion of the negotiators be  
4 important to consider?

5 A. I mean, the fact is that I think the  
6 negotiators were definitely functioning as members and  
7 representatives of the company, so I would expect that  
8 their actions they would have to answer to their  
9 superiors for. So, really it was a question of  
10 confirming that people at Schering were not likely to  
11 be out in some tail of distribution just completely  
12 risking it through and pushing it ahead without any  
13 risk aversion.

14 Q. But again, in terms of some scientific approach  
15 to assessing risk aversion, would you say that you  
16 conducted a scientific inquiry of that?

17 A. Absolutely, this was a scientific inquiry. I  
18 was not evaluating the quantitative measure of risk  
19 aversion. I was establishing that Schering was, in  
20 fact, as Mike Scherer's quote says that we have seen in  
21 this proceeding, I think, that people are risk averse  
22 and managers are risk averse.

23 Q. Based on your subjective assessment?

24 A. No, that's a general principle, and the  
25 question here was whether Schering is in some sense an

1 odd one out and is different from the mainstream, and  
2 the answer is it isn't.

3 Q. If the generic were risk averse, it would have  
4 been willing to accept a later entry date than would  
5 otherwise have been acceptable. Is that right?

6 A. If it were, that's right.

7 Q. And if both the brand and the generic were risk  
8 averse, those might balance one another out, correct?

9 A. What do you mean by "balance one another out"?

10 Q. In other words, the brand would be willing to  
11 give up an earlier date; the generic would have been  
12 willing to accept a later date; and you might have  
13 ended up in exactly the same spot, despite both  
14 parties' -- as a result of both parties being risk  
15 averse.

16 A. In the same spot as what?

17 Q. As if they were risk neutral.

18 A. It would be wild coincidence, but it's  
19 possible.

20 Q. Schering's supposed risk aversion in this  
21 instance stems from the risk of losing its profit  
22 stream from branded K-Dur 20. Is that right?

23 A. That's right, the income stream from branded  
24 K-Dur 20 and K-Dur 10 for that matter.

25 Q. And the reason that Schering runs this risk of

1       loss is because of entry of the A-B generic, correct?

2           A.   That's correct, because of mandatory  
3       substitution.

4           Q.   K-Dur 20 represented less than 3 percent of  
5       Schering's worldwide sales volume.  Is that right?

6           A.   I don't recall the numbers.

7           Q.   Is it your view that the uncertainty related  
8       to -- let's accept that number for the sake of  
9       argument, that 3 percent number.  Is it your view that  
10      the uncertainty related to less than 3 percent of  
11      Schering's worldwide sales would make it risk averse?

12          A.   With regard to decision-making in connection  
13      with this product line, the people likely to be making  
14      those decisions, it would have been much, much, much  
15      more than 3 percent.  So, the fact is that the  
16      corporation's risk aversion is manifest itself as  
17      behavior of a corporation, but there are decisions that  
18      are micro decisions that are being taken by people who  
19      have a lot at stake.  So, yeah, I don't think the 3  
20      percent of total sales has a whole heck of a lot to do  
21      with what we're talking about here.

22          Q.   And in terms of assessing risk aversion, since  
23      the corporation is really an entity, you would look at  
24      the individuals involved.  Is that right?

25          A.   You look at both things.  You look at what --

1     what the corporation does is made up of what people do,  
2     and when you look at the corporation and you say, no,  
3     it's not doing things that make me think of, you know,  
4     a -- something that's different from the mainstream,  
5     something that's just totally risk neutral, it's got  
6     the same types of activities that suggest that they,  
7     like other corporations, are risk averse, and the  
8     people making the decisions are managers who are risk  
9     averse for a number of reasons.

10        Q.   And how did you decide which managers to talk  
11     to?

12        A.   We're talking at cross-purposes.  The -- I  
13     don't mean to suggest that there were some managers who  
14     were risk averse and some managers who weren't, but  
15     rather, that the decisions being made are made by  
16     managers.  The general principle is that managers, like  
17     other people, are risk averse, and in this case, the  
18     evidence certainly suggested that Schering was not an  
19     exception.  Schering was behaving as if it were risk  
20     averse, i.e., as if its managers were risk averse.

21        Q.   All right, let's talk about Upsher for a  
22     moment.  Your opinion, as I understand it, is that  
23     Upsher may have had a cash flow problem at the time of  
24     settlement.  Is that right?

25        A.   Yes, its cash position, as I understand it, was

1 not very good.

2 Q. Okay. And you're not testifying that Upsher  
3 definitely had a cash flow problem but that it may  
4 have. Is that right?

5 A. I think that's right.

6 Q. Okay. In fact, Doctor, to conduct a thorough  
7 examination of Upsher's financial condition, you would  
8 have had to spend days talking to financial people and  
9 assessing Upsher's current and expected future cash  
10 flow situation. Isn't that right?

11 A. Well, if I had wanted to render an opinion, an  
12 auditing opinion about the cash situation, yes, I would  
13 have had to do a lot of things.

14 Q. Okay. And among other things, for example, you  
15 would have had to explore new product introductions  
16 that might alter the cash flow situation, correct?

17 A. Perhaps.

18 Q. You would have thought about exploring Upsher's  
19 access to capital, correct?

20 A. Again, if I were giving an auditing opinion,  
21 possibly.

22 Q. You would have had to explore other sources of  
23 cash flow, such as proceeds from licensing agreements,  
24 correct?

25 A. Possibly.



1           Q. And you would have looked at possible loans and  
2 lines of credit. Isn't that also right?

3           A. Yes, in the context of sort of the totality of  
4 the business, you know, what was the business doing and  
5 where was it going and what were the likely sources of  
6 revenue and cash flow and so on.

7           Q. And, in fact, you didn't conduct that sort of  
8 an evaluation, right?

9           A. That's correct, I did not.

10          Q. You cited to the June '97 Upsher financials  
11 showing income losses for the first half of '97. Do  
12 you recall that?

13          A. Yes, I do.

14          Q. Okay. And I think you said something along the  
15 lines of things were not likely to look up. Do you  
16 remember that?

17          A. Something to the effect that the cash flow  
18 situation was not good and the operations, the income  
19 from the operations, didn't look like that was going to  
20 help much.

21          Q. Isn't it true, Dr. Addanki, that the same  
22 financial documents that you were using show an  
23 expected turn-around in the second half of 1997? And  
24 you might want to look at Volume 1, tab 23, at page  
25 953. These I do not have a record cite for. This is I

1 think part of the backup material that you utilized.  
2 The page I'm looking at is Bates numbered USL 00953.  
3 Let's see if we can get it on the ELMO.

4 My point here, Doctor, is that you were talking  
5 about the period in June, and that was in terms of  
6 actual forecast -- actual/forecast, this was an actual  
7 number, was a big dip, but after that, if you're  
8 looking at the rest of the year, the plan was for a  
9 recovery in the latter part of the year. Isn't that  
10 right?

11 A. I've got to tell you, I can't tell what all  
12 these different bars are, but certainly the bars to the  
13 right --

14 Q. All move up, right?

15 A. They do move up, that's right.

16 Q. Okay, okay. And isn't it also true that  
17 Upsher's business documents created before June '97  
18 show an expectation of positive net income in 1997?  
19 And let me -- I'm sorry, let me first ask you if you  
20 can answer that in general.

21 A. I don't recall actually.

22 Q. Okay, let me ask you to turn first to CX 147,  
23 which is Volume 1, tab 17.

24 A. Tab 17, okay.

25 Q. Rachel, we'll switch to the computer. CX 147,

1 and at page 754, Rachel.

2 Now, this was, Doctor, a document prepared at  
3 the end of 1996, September 11, '96, correct?

4 A. Yes.

5 Q. Okay. And doesn't this show sales of \$53  
6 million and net income for '97 projected at over \$7  
7 million?

8 A. That's right.

9 Q. Okay. And in addition, if you could look at  
10 CX 114, that's Volume 1, tab 18, at page 152, and this  
11 is also -- this is a -- well, it says it's revised in  
12 May of '97, and if you look at the bottom of the page,  
13 what you'll find is if you look at the new products,  
14 and exclude Klor Con M20 since we're essentially taking  
15 that out of the mix, you can see that there are new  
16 products, folic acid, St. John's Wort and Prevalite,  
17 that are projected to bring in \$1.7 million in the  
18 second half of 1997. Is that right?

19 A. Where are you looking at?

20 Q. Do you have that?

21 A. I'm not sure I've got that. I think I'm on the  
22 right page.

23 Q. Are you on the right page?

24 A. But I'm not sure what you're looking at.

25 Q. I'm looking right at the bottom, there are new

1 products that are listed.

2 A. Okay.

3 Q. Do you see that? And I'm excluding Klor Con  
4 M20, because that's the litigation product, but looking  
5 at the other products that are referred to, which are  
6 folic acid, St. John's Wort and Prevalite, and asking  
7 you whether for 1997 -- and those products all were  
8 coming into being in the latter half of '97, excluding  
9 Klor Con M20. Don't those other three products total  
10 up to about \$1.7 million?

11 A. Yeah. I must confess that the numbers are a  
12 little small, but -- but -- meaning small to read, but  
13 something about 1.7 looks about right.

14 Q. Okay. And in addition, Upsher would also be  
15 collecting several million dollars from the Kos  
16 cross-license. Isn't that right?

17 A. There was some cross-license from which they  
18 were going to be getting money.

19 Q. Now, this one I think -- Rachel, this is in  
20 camera, is it not?

21 Okay, Your Honor, the next document I was going  
22 to show is an in camera document. I'm just trying to  
23 think if there is some easy way that I could do this  
24 without having to clear the courtroom. I could  
25 identify the document and have the witness look at it

1 and just draw general conclusions. Is that -- let's  
2 see --

3 JUDGE CHAPPELL: Whose document is it?

4 MR. ORLANS: Let me just consult with counsel  
5 on that. It's an Upsher document. Let me just spend a  
6 second.

7 JUDGE CHAPPELL: Okay.

8 (Counsel conferring.)

9 MR. ORLANS: Well, Your Honor, I'm afraid we've  
10 concluded that we will have to do the whole thing in  
11 camera. It's about a five-minute segment.

12 JUDGE CHAPPELL: Okay, I will need to ask the  
13 public to leave the courtroom. We are going into in  
14 camera session. You will be notified when we go back  
15 into public session.

16 (The in camera testimony continued in Volume  
17 25, Part 2, Pages 6222 through 6224, then resumed as  
18 follows.)

19 JUDGE CHAPPELL: As I walk out, I'll let the  
20 public know they can enter the courtroom again. We  
21 will recess until 4:25.

22 (A brief recess was taken.)

23 JUDGE CHAPPELL: You may continue.

24 MR. ORLANS: Thank you, Your Honor.

25 BY MR. ORLANS:

1           Q. Doctor, we were discussing Upsher's financial  
2 condition. Do you recall that?

3           A. Yes, sir.

4           Q. Okay. Shortly after Upsher received the first  
5 payment of \$28 million from Schering under the  
6 settlement agreement, Upsher distributed the \$28  
7 million to its shareholders. Isn't that right?

8           A. That's my understanding, yes.

9           Q. Okay. Doesn't that suggest to you, sir, that  
10 Upsher was not facing a cash crisis?

11          A. I'm not an expert on the corporate law issues  
12 here by any means, but I understand that given the  
13 particular corporate structure that Upsher-Smith had,  
14 that there were a couple reasons why it may have been  
15 sensible to bring the money back to the shareholders,  
16 because that was where in the first instance Upsher  
17 would go to get the money if it needed any in any  
18 event.

19                 And second, I think to some extent, having the  
20 money not sitting on Upsher's balance sheet may have  
21 been a good thing for a drug company in terms of  
22 attracting undesirable attention.

23          Q. So, let me be sure I understand you correctly.  
24 Your view is that there is no distinction between the  
25 shareholders and the company itself in a subchapter S

1 corporation. Is that essentially what you're saying?

2 A. I'm not claiming at all to be an expert on the  
3 legalities involved, but I do believe that the  
4 shareholders and the corporation are a heck of a lot  
5 more closely identified in that case than, you know, in  
6 the case of a public company with thousands of  
7 shareholders.

8 Q. So, if Upsher needed the money, it would go to  
9 the shareholders for the money. Is that what you're  
10 telling me?

11 A. That's right, that if you give the money to the  
12 shareholders, that would be the first place anyone at  
13 Upsher would go.

14 Q. That being the case, sir, could you tell me  
15 what analysis you did of the assets of the shareholders  
16 to determine whether the shareholders could have  
17 continued to fund the patent litigation?

18 A. I don't think this was ever an issue of funding  
19 the patent litigation. This was more an issue of what  
20 Upsher's cash was in order to continue with its  
21 development programs.

22 Q. Okay. How extensively did you analyze the  
23 assets of the shareholders in order to assess their  
24 ability to remedy the cash flow problems of the  
25 company?

1           A. I didn't do -- I didn't look at their assets.  
2 I understood from what had happened at Upsher that they  
3 were short of money for their development programs.

4           Q. So, you didn't look at the assets of the  
5 shareholders at all, did you, sir?

6           A. I did not.

7           Q. And yet that's the place where Upsher would go  
8 to get the money if it needed it. Isn't that right,  
9 sir? Wasn't that your testimony?

10          A. Having given them the \$28 million or so, yes,  
11 that's right.

12          Q. That's what I thought.

13                 You testified that the -- well, let me go back  
14 a step. We are going to move on to the third element  
15 of your test, which is the welfare-enhancing or  
16 nonwelfare-enhancing aspect. You testified that the  
17 entry of a generic could have ambiguous effects on  
18 consumer welfare. Is that right?

19          A. Yes, depending on the circumstances, that's  
20 right.

21          Q. And that's due to the lost consumer benefits  
22 from diminished promotional activities, correct?

23          A. Yes, advertising and promotional activities.

24          Q. So, in your view, the benefits of lower prices  
25 may be outweighed by the loss that consumers might



1     suffer from these promotional activities that were  
2     lost. Is that right?

3           A. Depending upon what happens in the specific  
4     market situation, that's right.

5           Q. Isn't it generally accepted, Dr. Addanki, that  
6     generic entry is good for consumers?

7           A. I think what you've got is situations where  
8     there are some drugs for which generic entry creates a  
9     huge benefit. These are drugs that generally do have  
10    monopoly power and have immense therapeutic advantages  
11    and so on.

12           I think certainly the Caves article to which I  
13    referred makes it clear that that's not -- that's not a  
14    universal rule. It doesn't apply always. And indeed,  
15    the effects can be ambiguous, and we've seen some  
16    evidence of the effects being ambiguous right here in  
17    the sense that we do see promotions scaling back  
18    sharply. So, I'm not sure that -- you know, I think it  
19    is true that there are very significant drugs for which  
20    the benefit may have been quite large.

21           Q. All right. So, when I asked you whether it's  
22    generally accepted that generic entry is good for  
23    consumers, you don't think that is generally accepted?

24           A. It depends on what you mean by it's generally  
25    accepted as good, in the sense that if you're looking

1 at the average, then one really significant drug  
2 where -- for which generic entry was, in fact, an  
3 unmitigated good can compensate for a lot of situations  
4 where, in fact, the generic entry did not increase  
5 consumer welfare. So, it sort of depends on what your  
6 definition is of "generally good."

7 Q. Of course, you didn't conclude here that the  
8 benefits of the reduced price from generic entry were  
9 outweighed by the lost promotional benefits, did you?

10 A. I did not make that evaluation.

11 Q. Isn't it true, sir, that in July 1998 a  
12 Congressional budget study estimated the generic  
13 competition in 1994 alone saved consumers from \$8 to  
14 \$10 billion?

15 A. I don't recall that specific cite.

16 Q. Let me show you -- this is in Volume 3, tab 5.

17 A. Volume 3.

18 Q. Do you see that in the paragraph that -- the  
19 last paragraph of the page actually on this page?

20 A. Yes, I do.

21 Q. Okay. Do you know whether that study took any  
22 account whatsoever of welfare losses from the cessation  
23 or reduction of promotional activities?

24 A. I don't recall, because I don't recall if I  
25 have read this, so I don't know the answer.

1 Q. Okay. You don't recall having read this?

2 A. That's right.

3 Q. Your opinion about the value of lost  
4 promotional activities is based on a statement from one  
5 of the first studies on the impact of generic entry, a  
6 study by Caves and Whinston, is that right, a 1991  
7 study?

8 A. Well, no, the statement -- the cite that I've  
9 offered for that proposition, that that is a general  
10 question, a question that occurs in general, is the  
11 Caves article, but the support that -- I think the  
12 evidence suggesting that, in fact, it's something you  
13 want to look at can be found right in this case.

14 Q. Well, let's talk about Caves and Whinston  
15 first, then we'll talk about the literature, then we'll  
16 talk about this case.

17 Since the Caves and Whinston article in 1991,  
18 there have been a number of papers studying the  
19 consumer impact of generic entry. Isn't that right?

20 A. I'm sure there have been, yes.

21 Q. Um-hum. As we sit here today, sir, can you  
22 identify for me a single published paper that in  
23 considering the consumer impact of generic entry  
24 attempted to factor in the potential welfare losses  
25 from lost promotional activity?

1           A. I'd be surprised if any did, because if you're  
2           doing it on a panel of drugs, a sample of drugs, that's  
3           a lot of work.

4           Q. So, the answer is you can't name any right now.  
5           Is that correct?

6           A. Right, right, and I'm not surprised.

7           Q. Now, the Caves and Whinston article, which by  
8           the way is in Volume 3 at tab 1 --

9           A. Okay.

10          Q. -- just so that you will have it in front of  
11          you.

12                 That article states that any welfare benefits  
13          of promotional activity would be attributable only to  
14          promotional activities that were informative as opposed  
15          to persuasive. Isn't that right?

16          A. Can you just give me a page cite on it?

17          Q. Sure. Why don't we start with page 3. Let me  
18          take this out of here.

19                 The part that I've identified reads, "To the  
20          extent that an innovative company's promotion merely  
21          disseminates information about the benefits of the  
22          chemical entity, generic entrants are unlikely to be  
23          particularly disadvantaged. In contrast, persuasion  
24          activities that incline providers toward prescribing  
25          the brand of the innovating company may serve to

1     attenuate the welfare gains arising from postpatent  
2     generic competition."

3             Then it continues, if you look to page 47, the  
4     portion that I've highlighted in yellow, "In  
5     particular, it seems that the welfare consequences of  
6     generic entry are ultimately closely tied to the degree  
7     to which promotion by innovative pharmaceutical  
8     manufacturers is informative rather than persuasive."

9             Do you see that?

10            A. Right.

11            Q. Okay. So, let me ask you again, sir, isn't it  
12     true that the article is drawing a distinction between  
13     advertising that was informative and therefore  
14     beneficial or at least arguably beneficial and  
15     advertising that was persuasive that was deemed not to  
16     be beneficial?

17            A. Well, I'm not sure that the article made such a  
18     sharp distinction, but it's clear that they are more  
19     interested in this article in the degree to which  
20     it's -- it's informative, that's true.

21            Q. And informative or informational activity is  
22     promotional activity that gives you information about  
23     the benefits of the category, right?

24            A. It's not just information about the benefits of  
25     the category. It's -- the relevant meaning of it here

1 is promotional activity that would tend to expand  
2 demand for the product and its substitutes.

3 Q. Okay. And that's as opposed to persuasive  
4 advertising, which would simply shift demand to the  
5 product. Isn't that right?

6 A. That's correct.

7 Q. And so informative advertising would inure to  
8 the benefit of all potassium chloride products and not  
9 just to K-Dur, correct?

10 A. Perhaps. I mean, I think that just depends on  
11 the vehicles that are used to disseminate that  
12 advertising.

13 Q. Sir, have you done any statistical or empirical  
14 analysis to be able to assess the degree to which  
15 K-Dur's promotional activity was informative rather  
16 than persuasive?

17 A. I have done no econometric study of that.

18 Q. And the advertising that you discussed in your  
19 direct examination, that wasn't part of any organized  
20 sampling techniques or any other systematic empirical  
21 design, was it?

22 A. Well, it was -- it was -- it was pretty  
23 systematic, because the fact is that all the documents  
24 from Schering having to do with marketing that I  
25 reviewed were very systematically espousing these

1 themes in their marketing and promotion which were  
2 informative, which were telling the customer to tell  
3 the patient about the dangers of hypokalemia and the  
4 importance of maintaining the potassium chloride  
5 supplementation. So, they were -- there were very few  
6 messages that I saw there that were not tied, in fact,  
7 to maintaining your potassium levels and the importance  
8 of that and the health consequences of not doing it.

9 Q. Did you provide us with all of the advertising  
10 that you saw?

11 A. You had it. I mean, it was in the record.

12 Q. Was that everything that you ever reviewed?

13 A. What's your question?

14 Q. Was it -- was that an exhaustive list of all  
15 the advertising you reviewed?

16 A. I think we're talking at cross-purposes a  
17 little bit. I said all of the marketing and planning  
18 documents for marketing purposes that I saw. When they  
19 laid out the themes for the marketing message and the  
20 advertising messages --

21 Q. I see.

22 A. -- overwhelmingly, the themes were informative  
23 themes.

24 Q. So, you never looked at the actual advertising,  
25 did you?

1           A. Did I look at actual ads? I can't say if I've  
2 looked at all the ads, no, that's right. I've looked  
3 at a lot, though.

4           Q. Um-hum. We talked a while ago about generic  
5 entry. Can you generalize to the degree of opining as  
6 to whether generic entry is good for consumers most of  
7 the time, or that's beyond you as well?

8           A. It's what I said. I mean, I think that there  
9 are certainly going to be situations where you've got  
10 branded pharmaceuticals that are important therapies  
11 that don't have good substitutes and where the entry of  
12 the generic doesn't do much to shift the demand curve  
13 but moves you along the demand curve, and there could  
14 be big benefits associated with that if it's a really  
15 important therapy.

16                 If you average that out, it may well be that,  
17 in fact, on average it's a good thing. It's just -- I  
18 don't think there's any way to say a priori that there  
19 are a lot of -- that it's true in the majority of cases  
20 even.

21           Q. All right. So, the answer is you don't have an  
22 opinion as to whether generic entry is good for  
23 consumers most of the time, right? You just don't  
24 know.

25           A. That's not what I said. What I said was if you



1 viewed it in terms of averaging out the effects of  
2 different things, I suspect it probably is good,  
3 because I suspect there probably are important drugs  
4 for which the effect is unambiguous and it's big.

5 Q. In terms of the welfare-enhancing benefits of  
6 promotional activities, wouldn't it be fair to say that  
7 prior to this case that's an issue that you never  
8 really sunk your teeth into?

9 A. No, that's not true. Actually, that's an area  
10 I've been kind of interested in. It's those papers  
11 that I haven't gotten around to writing yet.

12 Q. Let me ask you this, sir: Did you ever testify  
13 in front of Congress on this issue?

14 A. On the issue of advertising?

15 Q. The issue of the benefits of -- the  
16 welfare-enhancing benefits of advertising.

17 A. I have not.

18 Q. Did you ever publish any papers taking that  
19 position?

20 A. No.

21 Q. Now, you said earlier that in your view K-Dur  
22 20 has no therapeutic advantage worth paying a premium  
23 for. Is that right?

24 A. That's not exactly what I said, but what I said  
25 may well imply that. What I said was that what it --

1     what difference -- such differences as exist don't get  
2     in the way of substituting other products for it.

3           Q.   Okay.  Is it your view that, in fact, K-Dur 20  
4     has no therapeutic advantage worth paying a premium  
5     for?

6           A.   Well, worth to whom I guess is the question.  
7     You know, I don't know that there's a -- there's a  
8     sensible answer to the question the way you've asked  
9     it.

10          Q.   Let me ask you this, sir:  If and to the extent  
11     that consumers pay a premium for K-Dur 20, that would  
12     be because Schering's promotional activities convinced  
13     them to pay such a premium for a product that in your  
14     view isn't significantly different from other potassium  
15     chloride products.  Isn't that right?

16          A.   Schering's promotional activities cause  
17     physicians to write prescriptions for this product.  
18     Those promotional activities also stimulated demand for  
19     potassium chloride supplements, because they conveyed  
20     the informational messages about compliance and about  
21     hypokalemia and the dangers of it.  When those  
22     prescriptions were written, they were filled with K-Dur  
23     20, unless they were therapeutically substituted, and  
24     those customers or their payers end up paying higher  
25     prices than they would have paid for generics, that's

1 absolutely right, but that's the chain of -- that's the  
2 mechanism we're talking about by which this takes  
3 place.

4 Q. So, again, Schering's promotional activities  
5 have led people or resulted in people paying a premium  
6 for a product that in your view isn't significantly  
7 different from other potassium chloride products.  
8 Isn't that right?

9 A. Paying a premium for a combination of two  
10 things, a combination of the output from the  
11 promotional effort of Schering and the product that  
12 does not have any material therapeutic benefits over  
13 other potassium chloride.

14 Q. Have you ever heard this sort of advertising  
15 characterized as specious product differentiation? Is  
16 that a term you're familiar with?

17 A. No, I don't think I would believe that this  
18 kind of advertising was characterized as specious  
19 product differentiation.

20 Q. Do you understand the term?

21 A. I'm -- I couldn't define it for you, so I'd  
22 appreciate it if you tell me what you mean.

23 Q. Okay, what I mean is product differentiation  
24 that isn't based on a sound underlying basis; in other  
25 words, advertising something as therapeutically

1 superior that really isn't therapeutically superior.

2 A. But as I said, a lot of the promotional and  
3 advertising message had to do with the importance of  
4 maintaining a potassium chloride regimen, so I guess I  
5 just don't see what that's got to do with specious  
6 product differentiation in any sense.

7 Q. But didn't you tell me there was a lot of  
8 advertising, we talked about it, that said things like  
9 the product has less gastric -- causes less gastric  
10 upset?

11 A. I didn't say there was a lot of advertising. I  
12 said I'm aware that they do talk about that as well,  
13 but I've also said that the majority of the themes that  
14 they're hitting on are, in fact, informative themes  
15 about potassium.

16 Q. What percentage of the themes are informative,  
17 sir? You don't know, do you?

18 A. If I thought of it in terms of the themes  
19 written, certainly a large majority.

20 Q. But you didn't do any quantified study of their  
21 advertising content, did you?

22 A. I was not doing any quantitative study of that.

23 Q. Haven't economists long debated whether drug  
24 detailing is beneficial to consumers?

25 A. I'm aware that there's been some debate on that

1 subject.

2 Q. And in fact, don't a lot of the drug companies'  
3 promotional activities go into things like boondoggle  
4 trips for doctors, where they spend money on those  
5 kinds of things?

6 A. Is your question does a lot of that money go  
7 there?

8 Q. Yeah, a fair amount of the money.

9 A. I've never looked into how much goes to things  
10 like that.

11 Q. You know that some does, right?

12 A. I've heard.

13 Q. Don't some economists believe that drug  
14 detailing is merely persuasive and simply creates the  
15 appearance of a better product?

16 A. I'm sure there are some economists who do, in  
17 fact, believe that.

18 Q. If, sir, we assume that Schering's promotional  
19 activities have led consumers to pay a premium for a  
20 product that's not significantly different from other  
21 products, then aren't consumers far better off with a  
22 generic entry that both lowers prices and eliminates  
23 that sort of advertising?

24 A. No, for exactly the reasons that I mentioned  
25 earlier, because all of the other information that is

1 provided -- there's output that goes beyond the 20  
2 milliequivalent pill, and you've got to take that into  
3 consideration as well.

4 Q. Sir, didn't you tell me that Schering's  
5 promotional activities were what enabled it to sell a  
6 product that was not significantly better in your view  
7 than other products?

8 A. Just as with any branded product, the  
9 activities in which Schering engaged to build demand  
10 for its product enabled it to get a premium over other  
11 products, that's correct.

12 Q. And if, in fact, the product offers no real  
13 benefit, wouldn't consumers be better off without that  
14 sort of advertising?

15 MR. SCHILDKRAUT: Objection, asked and  
16 answered. He asked this question two questions ago,  
17 and Dr. Addanki answered the question basically saying  
18 you have to include in that the other promotional  
19 activities that are educational and good for the  
20 consumer.

21 MR. ORLANS: Judge, I don't -- I don't mind  
22 arguing over this issue, but I really do take issue  
23 with Mr. Schildkraut essentially providing an answer.

24 MR. SCHILDKRAUT: Well, I didn't. Dr. Addanki  
25 provided the answer.

1 JUDGE CHAPPELL: I'll overrule the objection.

2 Susanne, read the question back.

3 (The record was read as follows:)

4 "QUESTION: And if, in fact, the product offers  
5 no real benefit, wouldn't consumers be better off  
6 without that sort of advertising?"

7 THE WITNESS: I think maybe my last answer  
8 wasn't clear, but the fact that the 20 milliequivalent  
9 tablet doesn't provide any significant therapeutic  
10 benefit over the competition doesn't mean that the mix,  
11 the overall combination that the patient is taking,  
12 which includes the pill as well as the information and  
13 whatever else has been provided, is not better.

14 BY MR. ORLANS:

15 Q. Let me ask you this, Doctor: In terms of the  
16 importance of promotional activity, we've already  
17 discussed the fact that the Schering marketing  
18 documents during this period consistently reflect that  
19 the product received minimal detailing and promotional  
20 support, right?

21 A. There are -- in each of those documents, there  
22 is one sentence that says that, but the rest of the  
23 document goes on to talk at length about all the  
24 promotional activities and the marketing expenditures  
25 that they're engaged in.

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1           Q. There's been virtually no promotional activity  
2     for potassium chloride products since the beginning of  
3     2001. Isn't that right?

4           A. No, I think there's been some -- I think you  
5     had a pickup in Micro-K, I believe, they were doing  
6     some, and I think there was substantial promotional  
7     activity by Upsher-Smith when they got in. Certainly I  
8     think Schering-Plough had tapered off very considerably  
9     in anticipation of the generic entry.

10          Q. Are you telling me, sir, that Upsher engaged in  
11     substantial advertising?

12          A. No, I am talking about the overall mix of  
13     promotional expenditures, and I believe there was some  
14     testimony that they, in fact, had promotional  
15     expenditures.

16          Q. So, now you're telling me that the advent of  
17     and entry of the generic could actually lead to the  
18     generic firm's involvement in advertising and  
19     promotional activities? Is that right?

20          A. I think there was some launch-related  
21     promotional activities, but my impression of Upsher  
22     certainly is not that they would continue to sustain  
23     the kinds of promotional efforts that Schering was  
24     doing.

25          Q. Isn't it true, sir, that throughout 2001, that



1 both total prescriptions and new prescriptions for  
2 potassium chloride products have continued to grow at a  
3 steady pace?

4 A. You know, I couldn't tell you as I sit here now  
5 whether month to month they've grown every month, but I  
6 think they have been on the up trend.

7 Q. Schering's promotional and selling expenses for  
8 K-Dur in 2000 totaled about \$10 million. Isn't that  
9 correct?

10 A. I'd be happy to look at a document. I don't  
11 remember the exact number.

12 Q. Okay. You don't know those numbers?

13 A. I don't --

14 Q. Did you look at the amount of money that  
15 Schering spent on promotional activities over the  
16 course of the mid-nineties to 2000, sir?

17 A. I have looked at them, and they are in my  
18 report. I don't have them memorized.

19 Q. All right, let me have you turn to Volume 1,  
20 tab 2, CX 695, at page 701, and under Total Promotion,  
21 the number is only \$1.8 million, and because I'm  
22 offering a special deal today, Doctor, I'll even throw  
23 in the total selling numbers, which are a little over  
24 \$8 million. That totals about \$10 million. Isn't that  
25 right?

1           A. Right.

2           Q. Okay. Earlier -- in fact, I think it was last  
3 Thursday, Doctor -- we talked about approximately \$50  
4 million in cost savings to consumers. Do you remember  
5 that? We went through some hypotheticals and  
6 ultimately concluded that under certain assumptions  
7 that was a fair number to use. Do you recall that?

8           A. Under your hypothetical, we came up with a  
9 number of \$50 million. I don't know whether that was  
10 fair to use for anything.

11          Q. Okay, well, I think actually, Doctor, that the  
12 data and other materials we've shown you have borne  
13 that out, but putting that aside, is it your testimony,  
14 sir, that the consumer benefits lost by the loss of  
15 Schering's \$10 million of promotional activity  
16 outweighs the more than \$50 million of savings,  
17 assuming that's a correct number, that consumers will  
18 realize? Is that your testimony here?

19          A. Let me be clear that I don't know what, in  
20 fact, the savings are, that I've not quantified the  
21 benefits to consumers, but one of the things we have to  
22 keep in mind is that as the -- as we move forward in  
23 time, these benefits or the loss of the benefits will  
24 grow in importance. So, it's not just a question of  
25 looking at benefits this year, savings this year. You

1 have really have got to look at it going forward as  
2 well, and I haven't done that exercise.

3 Q. Putting aside looking forward, just looking at  
4 the year of 1998, if that number I gave you is correct,  
5 that there are \$50 million in consumer savings, you're  
6 weighing that against losing \$10 million in overall  
7 promotional activities, including both persuasive and  
8 informational activities, is it your testimony that the  
9 promotional loss would outweigh the cash savings?

10 A. I think we have to be clear. The answer is it  
11 could be, it could well be, and the reason for that is  
12 that the benefits associated with these activities are  
13 not measured by the dollar amount spent on them. So,  
14 the answer is it could be. I haven't looked at that.

15 Q. So, in general, as an economic proposition, you  
16 wouldn't be willing to conclude for purposes of  
17 comparison that the benefits of the advertising would  
18 be roughly measured by the cost of the advertising. Is  
19 that right?

20 A. Oh, that's definitely true, yes.

21 Q. Okay. We talked about the Micro-K line and  
22 KV's acquisition of that line. Do you recall that,  
23 sir?

24 A. Yes.

25 Q. Okay. And what happened there, just to refresh

1 everyone's recollection, perhaps including my own, is  
2 that KV, which manufactured the generic product Ethex,  
3 Ethex 10, I believe, that KV acquired the branded  
4 product, Micro-K. Is that right?

5 A. That's my understanding.

6 Q. Okay. And that acquisition actually took place  
7 around March of '99. Isn't that right?

8 A. That's my recollection, late '98, early '99.

9 Q. Okay. Did you review the KV advertising for  
10 Micro-K?

11 A. What do you mean, did I review it?

12 Q. Well, what I'm getting at, sir, is did you make  
13 any assessment of how much of the KV advertising was  
14 informative versus persuasive?

15 A. Oh, no, I did not.

16 Q. Okay. According to the IMS pricing data that  
17 you used, Dr. Addanki, didn't KV immediately institute  
18 large price increases on both the Micro-K and Ethex  
19 products?

20 A. Well, let me turn to that. Do you have that  
21 somewhere?

22 Q. I think that's your tab 40. Is that correct?  
23 Am I right? What a memory. It would be your tab 40,  
24 and I'll put it up on the ELMO for the Judge.

25 So, again, sir, isn't it true that after

1     acquiring -- that is, after the A-B generic acquired  
2     its branded counterpart to which it was A-B rated that  
3     it immediately instituted large price increases on both  
4     products?

5           A. Well, it's certainly true that the prices of  
6     both products went up, and the timing -- the timing is  
7     about right. The timing's about right.

8           Q. Dr. Addanki, I have your IMS backup data, and  
9     what I'm going to do is show you a chart which we've  
10    prepared from your backup data. I brought a calculator  
11    if you see the need to try to compare these data to the  
12    backup just to verify their accuracy. Let me put the  
13    chart up on the board as a demonstrative.

14           May I approach, Your Honor?

15           JUDGE CHAPPELL: Yes, you may.

16           THE WITNESS: Thanks.

17           MR. ORLANS: Sure. Here's the backup data.  
18    I'll give you a calculator if you need it.

19           MR. GIDLEY: Mel, do you have a copy for  
20    counsel?

21           MR. ORLANS: Let me see if I can dig some up.

22           THE WITNESS: Are you proposing that I check  
23    each of these numbers here?

24           BY MR. ORLANS:

25           Q. No, I'm actually just offering it if that would

1 give you comfort. I'm happy to have you take my word  
2 on this or perhaps just check the beginning and end  
3 dates, because what I was going to ask you is whether  
4 it wasn't true that the price of Ethex 10  
5 post-acquisition increased from 4.6 cents a pill in  
6 March '99 to 9.2 cents a pill by December of 2000.

7 MR. SCHILDKRAUT: Your Honor, I object. We  
8 have not been able to look at the underlying data to  
9 make sure that this is all appropriately calculated.

10 MR. ORLANS: Your Honor, it's his data, and  
11 I've taken the numbers straight from that. He's  
12 welcome to check it. In the alternative, I have the --

13 JUDGE CHAPPELL: Which is -- excuse me, Mr.  
14 Orlans, which is what we are going to do. We are going  
15 to pause, let him have a calculator, and let him  
16 respond to the question you've just asked.

17 THE WITNESS: Thank you, Your Honor.

18 JUDGE CHAPPELL: Objection overruled at this  
19 time.

20 THE WITNESS: I'm a little foxed by this. As  
21 you might imagine, I haven't looked at the data in this  
22 form.

23 MR. ORLANS: Let me see if I can't make the  
24 task a little easier for you, Doctor.

25 May I approach, Your Honor?

1 JUDGE CHAPPELL: Yes.

2 BY MR. ORLANS:

3 Q. I have a copy with tabs on it, maybe that will  
4 help you. Why don't you give me back the untabbed set.

5 A. All right.

6 Q. Thank you.

7 A. (Document review.) Okay, I --

8 Q. Would you like the question read back, Dr.  
9 Addanki?

10 A. No, I think I've got the question on board.  
11 You want me to confirm that the January 1999 average  
12 price based on IMS for Ethex 10 was 4.6 cents --

13 Q. Actually, the difference -- it was March '99 --

14 A. I beg your pardon.

15 Q. -- compared to December 2000.

16 A. March '99, 4.6 cents, so I've got March '99,  
17 I've got dollars divided by a quantity measure, which  
18 I'm assuming is later in your --

19 Q. I think so.

20 A. Dollars, dollars -- okay, extended units.  
21 36,787.

22 All right, no, I don't have that. I have 4.91  
23 cents, so no, I don't get 4.6 --

24 Q. You got 4.91 cents in March '99?

25 A. That's what I get. I'll try again. March 1999

1 has a dollar figure of 1809, right, divided by extended  
2 units -- actually, let's look right here. I beg your  
3 pardon, I've gone to the wrong place, haven't I?  
4 Sorry, I do, 4.6 cents.

5 Q. Okay. And then going up to 9.2 cents in  
6 December 2000. Is that correct?

7 A. We'll do that one. December 2000. December  
8 2000, we have 3681 divided by 40,070 -- 9.2.

9 Q. Okay. So, after the merger, the price of the  
10 Ethex 10 product went up in a year and three-quarters  
11 100 percent. Is that correct?

12 A. That's about right.

13 Q. Okay. And in fact, going back to your  
14 demonstrative, Doctor, isn't it true that prior to the  
15 merger, the Ethex 10 price had either remained constant  
16 or actually gone down a little bit?

17 A. Based on the data, yeah, it was about constant  
18 to having gone down a little bit.

19 Q. Okay. And the price of Micro-K 10, didn't that  
20 increase post-acquisition from 15 cents a pill in March  
21 '99 to 22 cents a pill in December 2000?

22 A. Yes, it did.

23 Q. Okay. So, that's about a 50 percent increase  
24 in that period of time, correct?

25 A. I haven't worked that out, but -- yeah, about



1       that, right, about that.

2           Q.   Now, looking at just one year, consumers paid  
3       about \$39 million for Ethex 10 tablets in the year  
4       2000, up from \$30 million in 1999, right?

5           A.   Yeah, but you can see they're about the same  
6       volume.

7           Q.   It is, in fact, about the same volume. Well,  
8       the volume went down a little bit, in fact, didn't it?

9           A.   Well, December 2000 was 40 million, and March  
10       '99 was 39. Those are units.

11          Q.   So, again, looking at this chart, Doctor, isn't  
12       it true that the units are about the same? The units  
13       actually fell a little bit in 2000 from 471 to 461, but  
14       the sales went from 29 up to about 39, right? So, in  
15       other words, sir, consumers paid about 10 million more  
16       for a little bit less product.

17           JUDGE CHAPPELL: Hold on, let him answer the  
18       first question before you go to the next.

19           MR. ORLANS: Okay.

20           JUDGE CHAPPELL: Susanne, would you read the  
21       first question, please.

22           (The record was read as follows:)

23           "QUESTION: So, again, looking at this chart,  
24       Doctor, isn't it true that the units are about the  
25       same? The units actually fell a little bit in 2000

1 from 471 to 461, but the sales went from 29 up to about  
2 39, right?"

3 THE WITNESS: Well, frankly, if you look at  
4 the -- if you look at the time path of these things,  
5 the price change happens actually for the most part in  
6 1999. Certainly a bigger price change in 1999  
7 percent-wise and absolutely than in 2000, and it  
8 doesn't seem to have any effect whatsoever on output,  
9 right? And at the same time, when promotion is  
10 stepping up as well.

11 BY MR. ORLANS:

12 Q. Well, again, Doctor, could we just deal with my  
13 question, which is isn't it true that consumers paid  
14 \$39,000 -- excuse me, \$39 million in 2000 versus about  
15 \$29 million in 1999 and actually got a little bit less  
16 product? Isn't that right?

17 A. That's -- that's correct.

18 Q. Now, your promotional data showed that KV  
19 increased promotions of Micro-K to about \$400,000 a  
20 year. Is that right?

21 A. That's right, from just about zero.

22 Q. Okay. So, consumers got \$400,000 in  
23 promotional benefits and essentially lost \$9 million in  
24 higher prices. Isn't that right?

25 A. No.

1           Q. Let me ask you this, sir: Doesn't KV's ability  
2     to raise its price so dramatically after acquiring the  
3     Micro-K line and combining it with its A-B generic  
4     demonstrate the existence of monopoly power?

5           MR. GIDLEY: Objection, vague. In what  
6     product?

7           MR. ORLANS: In the --

8           JUDGE CHAPPELL: Overruled. He can answer if  
9     he understands the question.

10          THE WITNESS: Do you mean does it show that  
11     Micro-K had monopoly power?

12          BY MR. ORLANS:

13          Q. Correct.

14          A. I mean, to conclude from this that Micro-K had  
15     monopoly power would be ludicrous.

16          Q. I'm sorry?

17          A. I think it would be ludicrous to conclude from  
18     this that Micro-K had monopoly power.

19          Q. So, the fact that the prices went up 100  
20     percent for one product and 50 percent for another  
21     wouldn't lead you to conclude there was monopoly power  
22     here?

23          A. And the promotional efforts went up infinite  
24     amounts, because they went from zero to \$400,000, which  
25     is the first time they had promoted this product in

1 years.

2 Q. Sir, if you were challenging this or thinking  
3 about providing economic testimony on this as a merger,  
4 isn't this a merger that would give you pause if you  
5 knew that the increases were going to be of this  
6 magnitude?

7 A. Well, what you've got is a situation where  
8 returns to promotion are being internalized in a way  
9 that they cannot be captured with the existent state of  
10 competition. I think to draw any conclusion about what  
11 the impact is on, you know, any meaningful yardstick of  
12 consumer welfare of this is something you couldn't --  
13 you couldn't simply get to without looking a lot more  
14 closely at what was going on, and certainly I would say  
15 that the notion that Micro-K had monopoly power is  
16 just -- is just absurd.

17 Q. So, the fact that they were able to increase  
18 price on one product post-merger by 100 percent and the  
19 other product by 50 percent, that wouldn't sway you in  
20 any way. Isn't that right?

21 A. Well, I have not -- I must say that I haven't  
22 looked at that merger. I haven't looked at how I would  
23 evaluate that merger, but these facts alone I don't  
24 think tell you anything about Micro-K having monopoly  
25 power.

1           Q. In merger law, Doctor, where you're considering  
2 possibly anti-competitive effects, doesn't one  
3 generally look at a small but significant price  
4 increase in the range of 5 to 10 percent as being  
5 consequential?

6           A. Are you asking me a legal question?

7           Q. I'm asking you an economics question.

8           A. Oh, I'm sorry, I thought you said merger law.

9           Q. Excuse me, let me reframe it.

10                 As a matter of merger analysis, isn't it  
11 generally true in looking at a merger and possible  
12 anti-competitive behavior that if one could project or  
13 predict a 5 to 10 percent small but significant price  
14 increase that might result from a merger, that that  
15 would raise concern?

16                 MR. SCHILDKRAUT: Objection, again vague,  
17 because I don't know whether it's a nominal price or a  
18 quality-adjusted price.

19                 MR. ORLANS: I'm talking about absolute prices  
20 here.

21                 THE WITNESS: Two things. First of all, your  
22 small but significant nontransitory price increase is  
23 something that you do look at in a -- in the context of  
24 market definition, but I think the issue here, again,  
25 is given the peculiar nature of A-B rated competition,

1     which means that they don't really, in fact, in a  
2     meaningful sense compete with one another, because what  
3     gets dispensed when Micro-K is written is Ethex, I'm  
4     not sure, and I frankly haven't thought about exactly  
5     what I would conclude about this transaction.

6             It certainly isn't the case that the fact that  
7     they found it sensible to raise the Ethex tells you a  
8     heck of a lot about Micro-K's monopoly power.

9             BY MR. ORLANS:

10            Q.   Doesn't this situation provide a natural  
11     experiment demonstrating that combining the brand with  
12     its A-B generic enabled the company to raise prices on  
13     both products by 50 to 100 percent?

14            A.   When you say a "natural experiment," do you  
15     mean can we draw any inferences from this?

16            Q.   Sure.

17            A.   No, because I think that depends on the  
18     specific circumstances of Micro-K and Ethex. I don't  
19     think that generalizes in any sense.

20            Q.   Let me ask you to turn, sir, to CX 50, which is  
21     tab 16.

22            A.   Of which book?

23            Q.   Volume 1. Rachel, I'm interested in page 474  
24     first.

25            A.   Did you say 16?

1 Q. CX -- it's tab 16, yes.

2 This is an Upsher document dated April 1999.

3 Isn't that right, sir?

4 A. Yes, it is.

5 Q. And on page 474, they address the Ethex/Micro-K  
6 transaction, don't they? The middle of the page, don't  
7 they conclude, and I quote, "Ethex purchased Micro-K  
8 and now monopolizes the 591MM unit KCl  
9 microencapsulated market"?

10 Isn't that what they conclude in this document?

11 A. Well, that's what it's saying here. I can't  
12 imagine exactly what they mean, because there certainly  
13 are other microencapsulated products out there.

14 Q. Well, in fact, aside from K-Dur, wasn't this  
15 the only microencapsulated capsule?

16 A. Yeah, that's a big aside. That's --

17 Q. Well, obviously they didn't mean to include  
18 K-Dur in here, did they, sir?

19 A. Well, it's not clear what they meant by  
20 "microencapsulated market," and they left out K-Dur 20  
21 and K-Dur 10.

22 Q. Well, let me ask you to turn to page 476 under  
23 Ethex. Don't they conclude in the second and third  
24 bullets, "Monopoly - Lack of competition," and under  
25 that, "Recent high price increases"?

1 Do you see that, sir?

2 A. Yes.

3 Q. Okay. Let me turn one more page, page 477, the  
4 last bullet, "Chains like WalMart have expressed  
5 concern regarding Ethex monopoly over the  
6 microencapsulated market, including the potential for  
7 new price increases."

8 Do you see that?

9 A. Yes.

10 Q. So, it's fair to say that Upsher was aware of  
11 the KV acquisition and viewed KV as having monopoly  
12 power with that acquisition. Is that right?

13 A. Well, they certainly called it a monopoly in a  
14 microencapsulated market, a market which you would  
15 assume includes K-Dur. So, I'm not quite sure what  
16 they thought about monopoly power.

17 Q. Sir, you reject the notion that a brand and an  
18 A-B generic could be a market, yet isn't that exactly  
19 what Upsher concluded here?

20 A. No, I'm sorry, I don't reject the notion that  
21 they could be a market. I reject the notion that in  
22 this case K-Dur 20 and its A-B rated generic would not  
23 be a relevant market.

24 Q. So, you accept the fact that a brand and its  
25 A-B generic could be a market if the facts supported



1       that conclusion?

2           A.   It's -- it could be, yes.

3           Q.   Okay.  Isn't this, sir -- that is, your KV  
4       example -- isn't this the classic case of the two  
5       closest competitors merging and increasing prices?

6           A.   As I had said early today, it's a little  
7       difficult to know exactly what a -- how to characterize  
8       this competition, because as I said, the branded gets  
9       the prescription.  The A-B rated generic gets filled.  
10      They're -- I mean, in a sense, they're -- while one  
11      takes sales from the other, clearly that does happen,  
12      but as far as competition goes, it's a little hard to  
13      know what to make of it.

14                I think what you make of it is the fact that  
15      all incentives to promote dry up completely, to build  
16      demand dry up completely, but it's not the same thing  
17      as two firms that are close competitors in a -- you  
18      know, in a detergent market or something else getting  
19      together.  It's really quite different.

20          Q.   Well, let me ask you this, sir:  If KV was able  
21      to exercise market power by combining Micro-K and its  
22      A-B competitor, wasn't K-Dur 20 even better positioned  
23      to do so, prior, that is, to generic entry?

24          A.   Well, now you've really lost me.  You're  
25      talking about a situation -- you're asking me to

1 compare a situation where Micro-K and --

2 Q. Well, I'm asking if it were true that the  
3 example we've discussed with Micro-K and the  
4 combination of Micro-K and its A-B competitor, if that  
5 resulted in the market power, monopoly power, wouldn't  
6 K-Dur, K-Dur 20, be positioned to have even greater  
7 power than that?

8 A. I don't see how that follows.

9 Q. I have only a couple more questions, Doctor,  
10 and I want to talk very briefly about the ancillary  
11 restraint involved in prohibition of the sale of a  
12 noninfringing product. Do you recall that discussion?

13 A. My testimony about it you mean?

14 Q. Right.

15 A. Yes, I do.

16 Q. Okay. The concern that you raised here is that  
17 Upsher might have made a minor and insignificant change  
18 in its Klor Con M20 product and thus gotten around an  
19 agreement that only permitted the sale of a product  
20 that was at issue in the patent case. Is that right?  
21 Is that the concern?

22 A. No, my issue was really that when you settle a  
23 patent case, whatever the terms of that settlement are,  
24 the one thing that the parties absolutely want to be  
25 sure of is that they are settling and that there's not

1 going to be another lawsuit next month and another one  
2 the month after that over products that have slight  
3 wrinkles or minor variations. So, I think the point  
4 really is there that -- and this is really consistent  
5 with all the license agreements and settlements that  
6 I've seen -- is that when you do enter into it, you  
7 want to know that you've settled and that the issue is  
8 resolved and there's going to be no question of having  
9 to litigate this about another product three months  
10 from now.

11 Q. Well, I understand that concern, but doesn't  
12 that concern extend beyond sort of a fair concern and  
13 into the area of potential anti-competitive behavior if  
14 it goes beyond the product at issue and any minor and  
15 insignificant changes in that product? In other words,  
16 isn't it reaching too broadly?

17 A. The trouble is that you can't -- you can't  
18 write the clause sensibly any other way, because what  
19 would happen if you wrote it any other way is exactly  
20 what you want to avoid, which is opportunistic  
21 behavior.

22 In other words, someone would say, well, this  
23 product's sufficiently different that it really doesn't  
24 count, and then you're litigating the case again.

25 Q. Let's assume, Doctor, that a court, had this

1     been litigated to a conclusion, the court wouldn't have  
2     said don't ever make a potassium chloride product. The  
3     court, let's assume, would have said instead, don't  
4     make this product that's at issue here or any other  
5     product that is not materially different from this  
6     product.

7             MR. SCHILDKRAUT: Objection.

8             MR. ORLANS: This is all a hypothetical, Judge.  
9     If they are going to object on the grounds that it  
10    calls for a legal conclusion, it's all been assumed.

11            MR. GIDLEY: I'm not sure I understand the  
12    assumption, Your Honor. It still sounds like a legal  
13    question, to me, and we would object.

14            MR. ORLANS: Let me go back and restate it,  
15    because I certainly wouldn't want counsel to be  
16    confused.

17            BY MR. ORLANS:

18            Q. I'm asking you to assume, sir, that if this got  
19    litigated to a conclusion, that a court, rather than  
20    prohibiting all potassium chloride products, would  
21    conclude its injunction by saying you can't make the  
22    product at issue here and you can't make any other  
23    product that isn't materially different from the  
24    product at issue here. Are you on board with that?

25            A. Are you asking me to assume that?

1 Q. Yes.

2 A. Okay.

3 Q. And do you understand it?

4 A. Yes, I think I'm fine with understanding it.

5 Q. Okay, good, we're doing fine now.

6 The question I was going to ask you, then, is  
7 if such a provision had been used here as part of the  
8 settlement agreement, whether that wouldn't have solved  
9 your problem without reaching to include all potassium  
10 chloride products.

11 A. Well, I don't believe the settlement reached to  
12 include all potassium chloride products, because  
13 they're selling potassium chloride products and were  
14 selling them over the course of that -- in the interim  
15 period.

16 Q. Well, I stand corrected, all potassium chloride  
17 products that related to or referenced the branded  
18 product, K-Dur 20.

19 MR. GIDLEY: Object to the form, Your Honor.

20 THE WITNESS: Ah --

21 JUDGE CHAPPELL: Hang on.

22 THE WITNESS: Yes, sir.

23 JUDGE CHAPPELL: What about the form?

24 MR. GIDLEY: Your Honor, the question is vague  
25 as stated. Coming on the heels of the prior question,

1     it's simply impermissibly vague and I think lacks  
2     foundation as I stare at it.

3             JUDGE CHAPPELL: I'm going to sustain it. I  
4     think what I heard you do, Mr. Orlans, was change your  
5     question by agreeing with some answer. So, why don't  
6     you start again.

7             MR. ORLANS: Okay.

8             BY MR. ORLANS:

9             Q. Let's go back to the hypothetical of what a  
10    court might do. You're on board with that, right?

11            A. If I remember correctly, yeah, I'm okay with  
12    that.

13            Q. Okay. And the question I have for you, Doctor,  
14    is wouldn't it solve the problem here if instead of the  
15    provision that the parties agreed to that prohibited  
16    all microencapsulated products that bore on or related  
17    to K-Dur, that they adopted instead a more limited and  
18    narrow provision that simply said, you can't make the  
19    product that's the subject of the patent suit or  
20    anything that's not materially different from that  
21    product?

22            MR. GIDLEY: Object to foundation, Your Honor.  
23    What does the phrase "problem here" refer to? There is  
24    no foundation for this question.

25            MR. ORLANS: The witness testified about

1 opportunistic behavior, Your Honor. That's what I was  
2 referring to, and I think that was quite clear.

3 JUDGE CHAPPELL: What's the economist issue  
4 you're getting at here, Mr. Orlans?

5 MR. ORLANS: Well, Your Honor, he's testified  
6 that in his view the provision at issue was necessary  
7 to get around opportunistic behavior. The only point  
8 I'm making here is that I think a far narrower  
9 provision could have gotten around opportunistic  
10 behavior without broadly sweeping in noninfringing  
11 products.

12 MR. GIDLEY: Your Honor, if that's the  
13 foundation, he misstates the agreement.

14 JUDGE CHAPPELL: Do you want to restate the  
15 question?

16 MR. ORLANS: Sure.

17 JUDGE CHAPPELL: Is the objection withdrawn,  
18 then?

19 MR. GIDLEY: We'll listen to the next question,  
20 but as far as the previous question, yes, Your Honor.

21 BY MR. ORLANS:

22 Q. Let's go back to the hypothetical where I've  
23 asked you to assume what a court might do, okay?

24 A. Okay.

25 Q. Now, we've talked about opportunistic behavior

1 and the need to avoid that, and I'm asking you whether  
2 instead of the terms that the parties, in fact,  
3 included in this agreement a provision that merely said  
4 "don't make the product at issue in the patent  
5 litigation or any other product that's not materially  
6 different," whether that provision wouldn't be  
7 sufficient to avoid opportunistic behavior as we have  
8 described it.

9 A. Certainly based on my experience with  
10 settlement agreements, no.

11 Q. You've seen numerous instances, have you, sir,  
12 where that kind of a provision was used and used  
13 unsuccessfully?

14 A. No, I think the reason that you see it used in  
15 the alternative, I think you see the one that I have  
16 testified about being used rather than the one that you  
17 had suggested, is simply because of the scope of the  
18 opportunistic behavior.

19 Q. Well, there could be other reasons for that,  
20 sir, so let me ask you my question.

21 Have you been in a situation where you have  
22 seen the provision that I suggested to you used and  
23 then where efforts were made to subvert that?

24 A. I've certainly seen -- I can think of at least  
25 a couple of cases where there have been disputes



1     between the parties who had entered into the agreement  
2     about what were licensed products and whether a certain  
3     product was covered or not because putatively it didn't  
4     infringe the patent, and that's really an example of  
5     exactly the sort of thing I'm getting at here, and so  
6     the parties found themselves in another dispute.

7           Q. And did they use the language I suggested, sir?

8           A. I don't recall the exact language, but the  
9     language certainly was sufficient to permit the  
10    licensee in that case to attempt to assert that, well,  
11    this product was sufficiently different.

12          Q. What case was that, sir?

13          A. This was a case involving some -- some PC  
14    patents.

15          Q. Can you give me the name?

16          A. It -- I don't remember the case caption, and  
17    I'm not sure I can talk about it anyway, because it  
18    settled. It didn't go to trial.

19          Q. But a complaint was filed, as far as you know?

20          A. As far as I know, a complaint was filed. Well,  
21    the complaint was filed, yes, yes.

22          Q. And you can't recall the name?

23          A. No, it was a few years ago, about 10 years, 11  
24    years ago.

25          Q. And as we sit here, sir, is it your position

1     that in that case they did, in fact, settle using  
2     language like "this product or anything not materially  
3     different"?

4           A. I don't recall the exact language, but what I'm  
5     saying is that there was sufficient ambiguity about  
6     what was going to be considered infringing that at  
7     least the licensee saw an opportunity to argue that  
8     some products should be excluded ex post, because they  
9     were not within the definition of "licensed product"  
10    set forth.

11           MR. ORLANS: Your Honor, the only further thing  
12    that I have and I'd like to raise with the Court is my  
13    concern that this witness' testimony regarding risk  
14    aversion in my view does not have a scientific basis.  
15    I think that all the witness essentially provided was  
16    an "I'll know it if I see it" definition, and I'm -- if  
17    the Court would prefer, we can make that motion in  
18    writing, but I would move to strike any testimony from  
19    this witness about risk aversion on the grounds that  
20    essentially it was nothing more than his subjective  
21    view of the company as being risk averse and basically  
22    was nothing more than "I know it if I see it."

23           MR. SCHILDKRAUT: Your Honor, first of all,  
24    that wasn't his testimony. When we went through his  
25    testimony in direct, he cited to the experts in the

1 field, Nobel Prize winning economists on risk aversion.  
2 He cited to studies from Professor Scherer relating to  
3 risk aversion that said managers are generally risk  
4 averse.

5 Then he was asked on cross, have you done more,  
6 and he said yes, I've even done more. I went to the  
7 company and I asked specific individuals in the company  
8 how they operated, and this is exactly what an  
9 economist is supposed to do.

10 MR. ORLANS: What he did, Your Honor, was on  
11 direct put up some general information about risk  
12 aversion, and then when I queried him on cross,  
13 essentially the thrust of his testimony was I talked to  
14 some people, I know it when I see it.

15 MR. SCHILDKRAUT: No, he did more -- not  
16 only -- on direct, not only did he put up -- did we go  
17 to the literature on risk aversion, but we also went to  
18 Dr. Bresnahan's testimony, who agreed with Dr. Addanki  
19 on risk aversion, and that, in fact, managers are  
20 generally risk averse. So, what Dr. --

21 JUDGE CHAPPELL: I've heard enough. The  
22 motion's denied. I'll give the testimony the weight I  
23 think it deserves.

24 Redirect?

25 REDIRECT EXAMINATION

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1 BY MR. SCHILDKRAUT:

2 Q. Dr. Addanki, let's start near the back end with  
3 the IMS monthly data on Ethex 10 and Micro-K 10. Do  
4 you have that document in front of you? It doesn't  
5 have a number on it.

6 A. Is that the one that counsel gave me?

7 Q. Yes, yes, that was --

8 MR. ORLANS: Mr. Schildkraut, would you like me  
9 to give it an identification number? Would that be  
10 easier, because I really had not intended to use the  
11 document, but as long as I showed it to the witness --

12 MR. SCHILDKRAUT: An identification number is  
13 probably good for the record.

14 MR. ORLANS: Your Honor, let me just note for  
15 the record that we have marked the document with the  
16 IMS data on Ethex and Micro-K as CX 1713 for  
17 identification.

18 JUDGE CHAPPELL: Okay, thank you.

19 (Commission Exhibit Number 1713 was marked for  
20 identification.)

21 BY MR. SCHILDKRAUT:

22 Q. Doctor, do you have that document with you now?

23 A. Yes, I do.

24 Q. And I wanted you to go to the year 1999 and  
25 look at the volume, the extended unit volume across --

1 across 1999 as the price was rising, and I think you  
2 said in your cross examination that most of the price  
3 increase was that year.

4 A. Yes, I did.

5 Q. And what happened to the volume of Ethex 10  
6 from January '99 to December '99?

7 A. It -- it was up. It was up substantially, and  
8 apart from one -- well, there are a couple of blips up  
9 and down, but the trend is generally up.

10 Q. Okay. Now, Doctor, this acquisition of Micro-K  
11 took place in '99. Has the FTC challenged that  
12 acquisition?

13 A. Not to my knowledge.

14 Q. Does the FTC usually challenge mergers to  
15 monopoly?

16 A. I think that's certainly part of their mandate.

17 Q. Now, is this merger the level of the -- the  
18 price of this merger such that it would have to be  
19 filed under Hart-Scott-Rodino?

20 MR. ORLANS: Objection, Your Honor. That's a  
21 legal question, speaking of legal questions.

22 BY MR. SCHILDKRAUT:

23 Q. In your experience in working on mergers like  
24 this --

25 JUDGE CHAPPELL: Does this mean that you're

1 withdrawing the question and restating it?

2 MR. SCHILDKRAUT: I'm withdrawing it and  
3 changing it a little.

4 JUDGE CHAPPELL: Thank you.

5 BY MR. SCHILDKRAUT:

6 Q. In your experience in working on mergers of  
7 this type, was this the kind of merger that you usually  
8 saw filed under Hart-Scott-Rodino?

9 A. My recollection of the dollar amounts involved  
10 in terms of --

11 MR. ORLANS: Let me just object, Your Honor. I  
12 wasn't aware that this witness had any experience  
13 working on mergers under Hart-Scott-Rodino. So, I  
14 think there's a lack of foundation here.

15 MR. SCHILDKRAUT: I will ask the foundation  
16 question.

17 JUDGE CHAPPELL: I'm just thinking whether it's  
18 beyond the scope of cross. Go ahead with your  
19 foundation.

20 BY MR. SCHILDKRAUT:

21 Q. Dr. Addanki, have you substantial experience  
22 working on mergers that end up before the FTC and DOJ?

23 A. Yes, I do.

24 Q. And those mergers typically are mergers that  
25 have been filed under Hart-Scott-Rodino?

1           A. Yes, sir.

2           Q. Now, let me go back to the question I asked  
3 before.

4                   In your experience, is this merger of the size  
5 that would have been filed under Hart-Scott-Rodino?

6           MR. ORLANS: Your Honor, it's still a legal  
7 question. The merger -- the filing requirements under  
8 Hart-Scott-Rodino are statutory legal requirements and  
9 not within this witness' expertise.

10           JUDGE CHAPPELL: Well, I agree, we are not  
11 going to turn Mr. Addanki into an HSR expert; however,  
12 I'll allow him to answer the question. It's overruled.

13           THE WITNESS: My recollection was that it would  
14 be over the threshold, yes.

15           BY MR. SCHILDKRAUT:

16           Q. Okay. Now, Dr. Addanki, I want to go back to  
17 some of your early cross examination yesterday. Mr.  
18 Orlans asked you a question about whether Dr.  
19 Bresnahan's test was easier to apply for businessmen  
20 than your analysis. Were you actually trying to draft  
21 guidelines for businessmen to apply in their patent  
22 negotiations?

23           A. No, sir, I was not.

24           Q. Do you think economists have had enough  
25 experience with the conduct at issue here to draft such

1 guidelines?

2 A. Probably not.

3 Q. Okay. Okay, let me see if I can -- if we can  
4 go to tab 59 of your original set of tabs. I don't  
5 have my -- I don't have my whiz computer expert here,  
6 so today we're going to have to use the ELMO. I'm  
7 going to read -- this is the testimony -- this is at  
8 1021 of the public record -- Your Honor, this may be  
9 too much to put on here, but let's see what we can do.  
10 This was the testimony from Professor Bresnahan. So,  
11 I'll just read the question and answer.

12 "QUESTION: Now, let's say life isn't so simple  
13 and the parties say we want one global deal tonight and  
14 we want to get this settled. Are you telling me that  
15 Schering-Plough needs to do some kind of ordinary  
16 course of business assessment of the licensing in order  
17 to be safe with this valuation calculation, sir?

18 "ANSWER: In order to be safe? I would -- you  
19 asked me this question in deposition, and I answered it  
20 as I just answered it. If you wanted to be safe, the  
21 thing you have to do is break the linkage.

22 "QUESTION: So, can you sitting here today tell  
23 me one of the transactions that Upsher-Smith and  
24 Schering-Plough could have entered into in a single,  
25 global transaction that would have, you know, readily



1 satisfied the Bresnahan test in one single, integrated  
2 agreement?

3 "ANSWER: No, I can't if it has both of the  
4 elements in it."

5 So, the question I ask you is, does Dr.  
6 Bresnahan think it would be safe to apply the Bresnahan  
7 rule to businessmen?

8 MR. ORLANS: Your Honor, I am going to object  
9 on two grounds. First of all, it is not up to him to  
10 interpret what Dr. Bresnahan was saying here, but  
11 beyond that, I think this is a mischaracterization of  
12 Dr. Bresnahan's testimony. What Dr. Bresnahan said was  
13 that a single transaction of this sort -- let's see --  
14 had both elements that a single transaction would not  
15 save -- putting it together in one single global  
16 transaction wouldn't save it, as I understand what's  
17 being read here, but in any event, I think that it's  
18 just not appropriate to ask this witness to interpret  
19 Dr. Bresnahan's testimony.

20 JUDGE CHAPPELL: I'm sustaining the objection.  
21 The question says -- asks this witness what does Dr.  
22 Bresnahan think.

23 BY MR. SCHILDKRAUT:

24 Q. Well, let me ask you a question. Do you think  
25 businessmen would find it safe to apply the Bresnahan

1 rule to their negotiations of settlements?

2 A. Not given what Professor Bresnahan seems to be  
3 saying here, that any agreement that actually  
4 integrates two separate licenses into one agreement,  
5 one involving the patent at issue and the other not,  
6 could satisfy the Bresnahan test.

7 Q. Okay, let's turn to tab 14 of Mr. Orlans' -- I  
8 think it's Volume 1, and I believe, if I can find it, I  
9 think we were on 247. This doesn't look right. Well,  
10 maybe it does, okay. Yes, 247, which had -- if you --  
11 a K-Dur market in it.

12 A. Yes, sir.

13 Q. And what I'd like you to do -- and he asked you  
14 some questions about this K-Dur market. Would you turn  
15 to the previous page, which he didn't show you, and  
16 what market is set out there?

17 A. The total KCl market, as it's characterized  
18 here.

19 Q. Now, if you turn back past 247, what else do  
20 you find?

21 A. You find what I think is the 10  
22 milliequivalent, although the 1 has been omitted  
23 somehow, the 10 milliequivalent KCl market.

24 Q. And after that?

25 A. The 8 milliequivalent KCl market.

1 Q. And is -- are those subtotals of the total KCl  
2 market on USL 15246?

3 A. I believe they are.

4 Q. Which is CX 19?

5 A. Yes, sir.

6 Q. Okay. Okay, Mr. Orlans focused on tab 40, so  
7 let's look at -- let's take a look at tab 40.

8 A. Of which book, Mr. Schildkraut?

9 Q. Well, I don't know, we'll have to see.

10 MR. ORLANS: Well, I can tell you I don't have  
11 40 tabs, so --

12 BY MR. SCHILDKRAUT:

13 Q. So, it has to be -- yes, it's our original  
14 book.

15 He discussed with you whether K-Dur's sales  
16 were increasing as its price was increasing. Do you  
17 remember those questions?

18 A. Yes, sir.

19 Q. Now, if a company's sales are increasing, is  
20 that a hallmark of monopoly?

21 A. No.

22 Q. Oh, Mr. Orlans asked you a question about a  
23 case where there was a generic market, an FTC case. Do  
24 you recall those questions?

25 A. I think it had to do with something to do with

1 Mylan?

2 Q. Mylan, I think that was it, and if you have  
3 a -- if a market is a generic market, would K-Dur 20 be  
4 in that market?

5 A. I would assume not.

6 Q. Let's go to tab 56 -- I think I've already done  
7 that, so we can go on from there.

8 Okay, let's go to tab 2 of Mr. Orlans' book  
9 with testimony in it, so I think -- is that Volume 2 or  
10 Volume 3?

11 A. It's Volume 2, I think.

12 Q. Okay, where -- this is the testimony of Mr.  
13 Coleman.

14 A. Yes, that's --

15 Q. I'd like you to turn to page 75 of the  
16 testimony of Mr. Coleman, and I believe --

17 A. Is this tab 2, sir?

18 Q. Yeah, tab 2, and I believe Mr. Orlans was  
19 asking you some questions, if you recall, about K-Dur  
20 20 and the -- and the relative price of K-Dur 20 to  
21 Klor Con 20, and on page 75, there's another series of  
22 questions, and it says:

23 "QUESTION: Do you know how far below  
24 Upsher-Smith's average selling price for Klor Con M10  
25 is below Schering's K-Dur 10 price?

1 "ANSWER: No.

2 "QUESTION: Do you have a general sense?

3 "ANSWER: Approximately 50 percent."

4 Now, is -- a 50 percent difference in price,  
5 does that make K-Dur 10 a monopoly?

6 A. No, sir.

7 Q. You were asked about unilateral effects in the  
8 merger guidelines.

9 A. Yes, sir.

10 Q. Does the merger guideline have any concern  
11 about monopoly power from unilateral effects if there  
12 are no entry barriers?

13 A. No, I think in general, if there are no entry  
14 barriers, you're not concerned about the effects of a  
15 transaction.

16 Q. And what did you conclude about entry in the  
17 potassium chloride market?

18 A. Well, from the amount of entry that had  
19 occurred over time, I concluded it wasn't difficult to  
20 get in.

21 Q. Mr. Orlans showed you some revenue shares. How  
22 did Schering usually calculate market shares? Did they  
23 use revenue or did they use units?

24 A. Most of the calculations I've seen are unit  
25 shares, prescription shares.

1           Q. And when -- and is that an appropriate way to  
2 do the calculations?

3           A. I believe it is.

4           Q. When you were asked about switching by Mr.  
5 Orlans, could you explain what the point of your  
6 testimony was about switching?

7           A. The point about my testimony was that I  
8 understood that Professor Bresnahan had raised this as  
9 a possible impediment to substitutability of products  
10 one for the other, and my testimony about it was that  
11 for a couple of reasons, I didn't regard it as a  
12 material impediment, and those were the reasons about  
13 which I testified, one being, of course, that there's  
14 competition at other levels that happens, and the sort  
15 of second and third being that there were prescriptions  
16 that were written as just potassium chloride, which  
17 could be filled by a variety of -- with a variety of  
18 products at the pharmacist level, and finally, that  
19 there was this issue of pharmacists calling up  
20 physicians.

21          Q. Okay. Just switching the subject now, you were  
22 asked about the therapeutic properties of K-Dur 20.  
23 Does K-Dur 10 have the same therapeutic properties?

24          A. Well, it's the same microencapsulation, so as  
25 far as GI irritation is concerned, I would assume so.

1 Q. Is K-Dur 10 a monopoly?

2 A. No.

3 Q. Okay. About GI irritation, in your review of  
4 the literature, was this a substantial problem?

5 A. No, I believe I testified on direct, certainly  
6 one source that I looked at said the incidence is low.

7 Q. Is K-Dur 10 the best product for patients to  
8 take who suffer from GI irritation based on what you  
9 looked at?

10 MR. ORLANS: Your Honor, I think we're  
11 basically asking for a medical opinion here.

12 JUDGE CHAPPELL: I'll sustain that.

13 BY MR. SCHILDKRAUT:

14 Q. Okay, let me -- I wanted to ask you some  
15 questions on price discrimination, so we're going to go  
16 to tab 5 in Volume 3, I believe.

17 JUDGE CHAPPELL: Is it as cold out there as it  
18 is up here? I don't know about out there, but with  
19 these vents blowing, I'm experiencing some wind chill  
20 up here of about 25 degrees.

21 Go ahead.

22 BY MR. SCHILDKRAUT:

23 Q. All right, I'd like you to -- if you could pull  
24 out tab 5, which you were shown before, and this is a  
25 Congressional Budget Office study, and chapter 3 was

1 put in the binder by Mr. Orlans.

2 A. This is --

3 Q. It's going to be -- it may be the one down  
4 there if it's nowhere else, just process of  
5 elimination.

6 A. Yes.

7 Q. Okay. Could you turn to page 23? Okay, I'm  
8 going to read that to you.

9 "Different purchasers pay different prices for  
10 brand-name prescription drugs. Such discounting, which  
11 economists refer to as price discrimination, may be an  
12 important mechanism for aiding price competition in the  
13 pharmaceutical market."

14 Do you agree with that?

15 A. Yes, I do.

16 Q. And why is that?

17 A. Well, I think it goes on to explain that to  
18 some degree, that it rewards institutional purchasers  
19 that organize their patient base through formularies so  
20 as to encourage the use of less costly drugs where  
21 possible. Prohibiting or limiting discounts, as some  
22 people have called for, could decrease price  
23 competition.

24 Q. Okay. Do you know what an early bird special  
25 is in a restaurant?



1           A. Yes. As a matter of fact, there was a special  
2     at the Au Bon Pain where we had lunch today, and we  
3     were just wondering whether Au Bon Pain had monopoly  
4     power.

5           Q. Oh, you're taking my words away. So, can you  
6     explain why an early bird -- well, is an early bird  
7     special price discrimination?

8           A. Yes, it is.

9           Q. And all restaurants who have early bird  
10    specials, are they monopolists?

11          A. No, sir.

12          Q. Okay. How about movie theaters that offer  
13    senior citizen discounts, are they all monopolists?

14          A. No, sir.

15          Q. Okay, let's go to Volume 1, tab 12. This is a  
16    K-Dur marketing plan. This is CX 20, and I believe we  
17    were at 4037, and there's a chart at the top that you  
18    were shown which shows HMOs with 1 percent of sales.

19          A. Yes.

20          Q. Do you remember this? Does this include  
21    indirect sales to HMOs?

22          A. No, I would assume that this does not include  
23    sales through various kinds of formulary controls to  
24    patients who might be enrolled in HMOs.

25          Q. You were asked about a reservation date. Do

1       you remember that line of questioning?

2           A.   Yes, sir.

3           Q.   And I guess my question is, can you -- can  
4       firms always get a settlement at the reservation date?

5           A.   No.

6           Q.   And what do you have to -- and how can you get  
7       a settlement, then, if you can't get it at the  
8       reservation date?

9           A.   Well, if you're going to settle, it's going to  
10      be for something that would be less favorable to you  
11      than your reservation date. How much less favorable  
12      depends on the bargaining situation.

13          Q.   And can net consideration facilitate that  
14      settlement?

15          A.   It could.

16          Q.   Can that settlement be better than the outcome  
17      of litigation?

18          A.   As we discussed with the pictures that I was  
19      showing you yesterday, yes.

20          Q.   Okay. You were asked some questions about risk  
21      aversion, and you gave some answer relating to the due  
22      diligence you did at Schering-Plough on the issue of  
23      risk aversion.

24          A.   Yes, sir.

25          Q.   Can you tell me the -- well, let's start one at

1 a time -- one area of people you talked to?

2 A. I talked to people who were -- who had -- I  
3 think it was the treasurer's office who knew about the  
4 insurance carried by Schering-Plough.

5 Q. And what did you learn about insurance?

6 A. I learned that Schering-Plough had insurance  
7 with lower deductibles than was customary in the  
8 industry. I learned that Schering-Plough -- that's  
9 what I learned about insurance. So, that tells you  
10 something about risk aversion.

11 MR. ORLANS: Your Honor, I am going to object  
12 to this and move to strike. That was nowhere in the  
13 expert report.

14 MR. SCHILDKRAUT: Your Honor, they opened this  
15 up in cross examination. I didn't do this in direct.

16 MR. ORLANS: I didn't go beyond the scope of  
17 what was in his direct, Judge. All I asked is what he  
18 had done. If there was stuff that he was relying on  
19 for his conclusion about risk aversion, it should have  
20 been set out in his report. It's too late now to try  
21 to supplement that.

22 JUDGE CHAPPELL: Well, I am going to overrule  
23 the objection, but I am going to only consider this  
24 answer as fair response to what was asked on cross but  
25 not as part of his expert report.

1           MR. SCHILDKRAUT: Okay, I don't remember what  
2 my last question was at this point.

3           All right, I got the answer to the question, so  
4 we can move on.

5           JUDGE CHAPPELL: I think the silence is the  
6 Arctic air fans have stopped blowing, which is a good  
7 sign.

8           BY MR. SCHILDKRAUT:

9           Q. You were asked some questions about the  
10 economic value of a patent over time. Can the value of  
11 a patent grow over time?

12          A. Absolutely it could.

13          Q. And can you give us some reasons why that can  
14 happen?

15          A. Well, you could revise your valuation of a  
16 patent upward, in other words, as time goes on, you may  
17 realize that it's actually worth more than you thought  
18 if, for instance, the market opportunities to which it  
19 pertains end up being bigger or grow more quickly or  
20 shrink less slowly than you thought they might, and  
21 that those -- that's certainly one very good reason.

22           New applications and new markets may come up  
23 over time that -- to which the patent pertains. Those  
24 are obvious ones that come to mind.

25          Q. Okay. Let's turn to tab 1 of I guess it's

1 Volume 3, it's the Caves article, and I'd like to go to  
2 page 47 of the article. I'm not going to get this to  
3 work, so I'm just going to read part of it to you from  
4 page 47 of the article, and I'm looking at Implications  
5 for Public Policy, and it's on page 47, and I'll start  
6 with the second sentence there under Implications for  
7 Public Policy.

8 "One of the aspects of our results that perhaps  
9 most surprises us is the ultimate ambiguity they yield  
10 regarding the welfare effects of this competition. As  
11 we expected when we began our study, generic entry  
12 makes a drug available at much lower prices than  
13 prevailed during its period of patent protection, yet  
14 it does not significantly lower the price of the  
15 branded drug, and even more importantly, it does not  
16 lead to increases in the quantity of the contested drug  
17 that are sold. Indeed, quantities may decrease  
18 relative to those sold before patent expiration."

19 Is that consistent with your -- the conclusions  
20 that you've drawn here about the ambiguity and welfare  
21 effects?

22 A. Yes, sir, it is exactly that, it's the  
23 ambiguity in the output we're talking about.

24 Q. You were asked some questions about  
25 anti-competitive incentives of -- in patent

1 settlements. Are there any businessmen who do not have  
2 some incentive to act anti-competitively in market  
3 situations?

4 A. Well, every businessman would like nothing more  
5 than to be the monopolist in the market that he or she  
6 serves, but I think that's what competition's all  
7 about.

8 Q. Do all businessmen always act  
9 anti-competitively?

10 A. No, I think they like to obey the law  
11 typically.

12 MR. SCHILDKRAUT: I have no further questions.

13 JUDGE CHAPPELL: Recross?

14 MR. ORLANS: I have no questions, Your Honor.

15 MR. GIDLEY: Your Honor, I'm sorry, I do have  
16 some redirect, and observing the hour and the fact that  
17 previously I've sent us into night court, I'd estimate  
18 it at about 30 minutes, but given the temperature and  
19 the time of the testimony, we can either do it tomorrow  
20 or tonight with perhaps a two-minute break in the  
21 Court's pleasure.

22 JUDGE CHAPPELL: Comments?

23 MR. SCHILDKRAUT: I think we actually would  
24 like Dr. Addanki to be able to leave tonight, so I  
25 think it would be preferable to probably do it tonight.

1 It's -- Dr. Addanki, is that what you want?

2 THE WITNESS: If it wouldn't be an  
3 inconvenience for you, Your Honor.

4 MR. ORLANS: I'm fine, Your Honor, as long as  
5 we can get this done in half hour.

6 JUDGE CHAPPELL: I'm hopeful the temperature  
7 will rise from 50 now that the fans have stopped  
8 blowing. So, take your two-minute break and let's  
9 roll, Mr. Gidley.

10 (A brief recess was taken.)

11 REDIRECT EXAMINATION

12 BY MR. GIDLEY:

13 Q. Good evening, Dr. Addanki.

14 A. Good evening, Mr. Gidley.

15 Q. Sir, if Schering's unit sales were increasing  
16 between 1996 and 2000, in your view, would that be a  
17 hallmark of monopoly?

18 MR. ORLANS: Objection, Your Honor, asked and  
19 answered.

20 MR. GIDLEY: It's a different question, Your  
21 Honor. He was asked about sales by Mr. Schildkraut.  
22 I'm asking about unit sales.

23 JUDGE CHAPPELL: Since I don't remember  
24 everything that was asked and answered and I don't want  
25 to scroll back on my CaseView, I'll overrule the

1 objection and allow him to answer.

2 THE WITNESS: No.

3 BY MR. GIDLEY:

4 Q. Sir, in the potassium market, are rebates an  
5 important element of competition in your view?

6 A. It's my understanding that they are.

7 Q. May I direct your attention to the Addanki  
8 binder 1, tab 2. That's a document marked CX 695, sir.

9 A. Once I get my glasses untangled from this --  
10 there we go.

11 Q. Sir, directing your attention to the second  
12 page -- excuse me, the third page, Bates numbered 698,  
13 do you see that, sir?

14 A. Yes, I do, sir.

15 Q. It says at the top, "By brand, fourth quarter  
16 1997," and the one, two, three -- fourth line,  
17 "Rebates," do you see that line?

18 A. I do, sir.

19 Q. Would you look under the column Actual Year to  
20 Date, and this is for a document that is called K-Dur.  
21 Do you see that?

22 A. Yes, I do.

23 Q. And what is the amount of rebates fourth  
24 quarter 1997 in this document that Mr. Orlans showed  
25 you?



1           A. Are you talking about the year-to-date number,  
2   sir?

3           Q. Yes, actual.

4           A. Actual year to date for rebates is \$17,592,000.

5           Q. Sir, directing your attention to the next page,  
6   page 699, this is the fourth quarter of 1998. Under  
7   the column Actual, the line Rebates, what's the amount,  
8   sir?

9           A. \$34,565,000.

10          Q. Is that consistent with Schering-Plough being a  
11   monopolist at this period of time in the sale of  
12   potassium chloride?

13          A. Well, it certainly suggests that they were  
14   competing on price through rebates -- through rebates.

15          Q. Sir, in your view, are these rebate levels  
16   significant?

17          A. I haven't actually looked into any evaluation  
18   of that, Mr. Gidley.

19          Q. Could you simply compare the gross sales line  
20   at \$267 million with the rebate line of \$34 million on  
21   that page?

22          A. Yes, it's well over 10 percent.

23          Q. Directing your attention -- I can't read the  
24   next page -- to the following page, page 701, the  
25   fourth quarter 2000, do you see that, sir?

1 A. Yes, I do.

2 Q. And again, the rebate amount, sir, is what on  
3 the line underneath Actual Year to Date?

4 A. It's \$35,214,000.

5 Q. And is that number significant, sir?

6 A. It's about 10 percent of -- actually a little  
7 more than 10 percent of gross sales.

8 Q. Let me direct your attention, if I might, sir,  
9 very briefly to tab 8 of Mr. Orlans' binder, and I've  
10 highlighted the beginning of a paragraph towards the  
11 bottom of the page. This is CX 13.

12 "K-DUR 20 TRX market share is 29%."

13 Do you see that?

14 A. Yes.

15 Q. And as of 1995, sir, what percentage of  
16 potassium needs in the United States were being met for  
17 prescriptions by products other than K-Dur 20 at this  
18 time?

19 A. Well, 71 percent of the prescriptions for  
20 potassium chloride supplementation were being written  
21 by -- for products other than K-Dur 20.

22 Q. Let me direct your attention now, if I could,  
23 sir, to CX 18, again in Mr. Orlans' binder, tab 11, and  
24 sir, on Bates number page 64, which is actual page  
25 28 -- are you there, sir?

1           A.   Yes.

2           Q.   What was the promotional budget in this time  
3           period for K-Dur 20 in 1997?

4           MR. ORLANS:   Your Honor, I am going to object  
5           to that characterization.  I think that this is a plan,  
6           so -- I'm sorry, did you say budget?

7           MR. GIDLEY:   Budget.

8           MR. ORLANS:   I'm not sure this is a budget as  
9           opposed to a projection of, you know, of possible  
10          needs, and it certainly isn't the actual dollars.

11          Oh, I see, okay.  I withdraw that.

12          THE WITNESS:   It says that the total  
13          promotional dollars needed for 1997 were \$9,500,000.

14          BY MR. GIDLEY:

15          Q.   Was that a significant amount at that period of  
16          time in the United States in the potassium market?

17          A.   For 1997, I believe it was very significant.

18          Q.   All right, sir.  Let me direct your attention  
19          now, if I could, to tab 12, the same binder, Mr.  
20          Orlans' binder, and you were just asked a question  
21          about this.  I just want to clarify something, if I  
22          could direct your attention to page 8.

23          Do you recall that on cross examination, Mr.  
24          Orlans asked you questions about HMO activity, and it  
25          sounded as if you were talking about all managed care

1     accounting for 1 percent of the sales of K-Dur 20. Do  
2     you recall that line of questioning?

3           A. I recall the questioning about HMOs, yes, sir.

4           Q. The line that says, "Chain Stores," how do you  
5     interpret that? What sorts of firms or establishments  
6     are chain stores in this context?

7           A. I think they would be the chain pharmacies.

8           Q. What would be an example, sir?

9           A. Oh, there would be the -- you know, Pay Less  
10    Drugs, Rite Aid, the pharmacies in the old -- the  
11    pharmacy units of mass merchandisers, those type of  
12    stores.

13          Q. What about firms such as Walgreens or CVS,  
14    would you interpret this document as including those  
15    under Chain Stores?

16          A. Yes, I would.

17          Q. And do managed care patients present themselves  
18    at chain pharmacy stores?

19          A. All the time.

20          Q. I direct your attention now, sir, a little  
21    farther into the binder. Could I direct your  
22    attention, Dr. Addanki, to tab 16, CX 50. It's called  
23    News Business Opportunities, April '99. Can you turn  
24    your attention to the second page? I don't believe  
25    that it's -- I'm sorry, yes, it is, it's Bates number

1 474.

2 A. Yes, sir.

3 Q. And do you see what I've yellow highlighted?

4 "According to IMS, Apothecon 10 mEq unit market  
5 grew 80% in 1998."

6 Do you see that?

7 A. Yes, sir.

8 Q. Is that a significant shift in sales in the  
9 potassium chloride market in the U.S.?

10 A. Growing 80 percent?

11 Q. Yes, sir.

12 A. Yes, I would say it is.

13 Q. By the way, this document talks about and Mr.  
14 Orlans asked you about this phrase, "Ethex purchased  
15 Micro-K and now monopolizes," some kind of market.

16 Do you see that?

17 A. I do.

18 Q. Have you ever seen in all of your review of  
19 documents in the four or five years that Upsher-Smith  
20 competed against Schering, have you ever seen  
21 Schering's K-Dur 20 product characterized by the  
22 Upsher-Smith employees as a monopoly, using that word?

23 A. Not that I recall.

24 Q. Now, sir, if we were to look at the potassium  
25 chloride market in this time period, would we have

1 to -- if you turn the page to page 475, would we have  
2 to take a look at the activities and sales of Apothecon  
3 and Alra and Copley?

4 A. Yes, I believe they were all competitors in the  
5 potassium chloride market.

6 Q. How did Upsher-Smith characterize the marketing  
7 strategy of Alra? And directing your attention to the  
8 fourth sub-bullet there.

9 A. A low price strategy.

10 Q. How about on the next page, page 476, do you  
11 see the heading Slow-K?

12 A. Yes, sir.

13 Q. And again, the first bullet, what was the  
14 strategy of Slow-K in this time period according to the  
15 Upsher-Smith marketing executives?

16 A. I think it was a low price strategy in some  
17 channels.

18 Q. Directing your attention to the next page,  
19 Bates numbered 477, sir, do you see that?

20 A. Yes, sir.

21 Q. It says in the third bullet -- and we've  
22 highlighted it -- "Apothecon has captured 10 mEq unit  
23 share at the expense of Klor Con Tablets."

24 Do you see that?

25 A. Yes, sir.

1           Q. And what conclusions do you draw about  
2   Apothecon's sales activity versus Upsher-Smith at this  
3   time from that statement?

4           A. Well, that it is growing in part at the expense  
5   of Klor Con, Upsher-Smith.

6           Q. Sir, you were asked questions on cross about  
7   WalMart, and do you see the final two bullets on this  
8   page, 477?

9           A. Yes, sir.

10          Q. Sir, do you have any view about the ability of  
11   WalMart to exert its low purchasing price philosophy on  
12   pharmaceutical manufacturers?

13                 MR. ORLANS: Let me object to that, Your Honor,  
14   lack of foundation. There is no indication he has any  
15   knowledge of the situation vis-a-vis WalMart.

16                 JUDGE CHAPPELL: Sustained.

17                 BY MR. GIDLEY:

18          Q. Sir, have you thought about WalMart at all in  
19   doing your work in this case?

20          A. Yes, I have.

21          Q. And what thoughts have you had about WalMart in  
22   connection with this case and specifically purchasing  
23   activities with respect to potassium chloride?

24          A. Well, I've got a lot of experience in analyzing  
25   situations, transactions as well as other situations,

1     where WalMart is a buyer, and I certainly have had  
2     plenty of occasion to study WalMart's abilities as well  
3     as proclivities as a buyer, and they know how to take  
4     care of themselves.

5           Q.   Meaning, sir?

6           A.   That they will -- if they are not happy with  
7     terms and conditions, price, whatever it is they're  
8     getting, they know how to exert the leverage needed in  
9     order to either get better terms and conditions from an  
10    existing supplier or simply go to another supplier.

11          Q.   Finally, sir, on the next page, top bullet,  
12    "Carve out special pricing for Qualitest."

13               Do you see that?

14          A.   Yes, sir.

15          Q.   Sir, have you studied Qualitest in your review  
16    of the potassium chloride market?

17          A.   Yes, although I can't recall exactly what I've  
18    seen in connection with Qualitest.

19          Q.   All right. Do you recall anything about  
20    Qualitest and the ability to reduce prices?

21          A.   No, I can't say I do right now.

22          Q.   Let me direct your attention, if I could, sir,  
23    a little bit deeper into the document, a little deeper  
24    than you were shown in cross, and I'm going all the way  
25    to the back of this tab to page 529. Can you go to the



1 page that's Bates numbered 529, sir?

2 A. Yes, sir.

3 Q. This is a memo to Mr. Dritsas from Ms. Dolan  
4 dated June 1996. How does Ms. Dolan characterize  
5 Apothecon's pricing?

6 A. As being aggressive.

7 Q. And how do you interpret that, sir?

8 A. Well, that they were coming in with low prices.

9 Q. Directing your attention to the next page,  
10 which is also from Ms. Dolan, I've highlighted a  
11 sentence or two there. In the middle of the page under  
12 Market, it says, "Market intelligence has shown that  
13 aggressive pricing strategies are driving the buying  
14 decisions in this market. Slow-K, for example, showed  
15 a unit increase of 41% from 1994 to 1995 while their  
16 dollar share continued to decline."

17 Do you see that?

18 A. Yes, I do.

19 Q. And sir, what does that tell you about the  
20 potassium market at this time?

21 A. That there was a lot of price competition going  
22 on.

23 Q. And sir, what's your view of whether or not  
24 that price competition was effective in changing share  
25 or sales?

1           A. I believe that share was -- and I've seen this  
2           in the Upsher as well as the Schering documents -- that  
3           share was moving in response to price.

4           Q. Directing your attention to the next paragraph  
5           where it says, "Recently, Apothecan entered the market  
6           with a generic to their own brand Klotrix. This entry,  
7           along with a dramatic change in their unit trend in 95,  
8           reiterates the fact that this market is becoming  
9           increasingly price sensitive."

10                  Do you see that?

11           A. Yes, sir.

12           Q. And sir, the reference here to "market," what  
13           does that refer to?

14           A. I believe the market here is potassium chloride  
15           that they're talking about.

16           Q. Let me direct your attention a couple of tabs  
17           down, sir, to tab 21, SPX 954. Are you there, sir?

18           A. Yes.

19           Q. Flip down to the page that Mr. Orlans showed  
20           you. It's page number 8, and the Bates number is in  
21           the middle of the page. I'm sorry, I think it's at the  
22           very bottom, 63, it's in real small print. Have you  
23           found that page?

24           A. Yes.

25           Q. Let me put it on the ELMO.

1           Mr. Orlans read to you the first sentence on  
2   this page, and it didn't stay on the ELMO very long.  
3   I'd like to keep it on the ELMO just a few seconds  
4   longer.

5           He read you the first sentence about the  
6   branded competition. Do you recall those questions?

7           A. Yes, I do, sir.

8           Q. The final sentence of that paragraph says, "The  
9   'generic' competitors (A and BC rated) gain share  
10   (prescriptions) by offering trade and managed care  
11   accounts various discounting programs and influencing  
12   therapeutic substitution."

13          Do you see that?

14          A. Yes, sir.

15          Q. What's the reference there to "therapeutic  
16   substitution"?

17          A. I think the therapeutic substitution we're  
18   talking about there is substitution after, if I  
19   understand it correctly, after the prescription is  
20   written, substituting drugs that are not B-C -- excuse  
21   me, that are not A rated generics for a branded drug.

22          Q. So, sir, is that an example of switching post  
23   prescription being written?

24          A. That's how I would interpret this, yes.

25          Q. Let me direct your attention, if I could, to

1     tab 23, the page that's Bates numbered 944. I'll try  
2     to put it on the ELMO for you. This is a document that  
3     begins with the Bates number USL 937.

4             A. Yes, sir.

5             Q. Some financial statements.

6                     I'm sorry, this is a little hard to read on the  
7     ELMO, but I want to direct your attention to the line  
8     Operating Income. This page says at the top "June 1997  
9     Results."

10            A. Yes, sir.

11            Q. If you go all the way to the far right-hand  
12     column, it has 735 in parentheses and minus 29.2  
13     percent. Do you see that?

14            A. Yes, sir.

15            Q. And how do you read that document, sir?

16            A. That's negative operating income for I would --  
17     that's the actual achieved of \$735,000.

18            Q. Let me direct your attention, sir, if I could  
19     to the next page?

20            A. That's an operating loss, I should say.

21                     MR. ORLANS: Excuse me, Mr. Gidley.

22                     Your Honor, I am going to renew an objection I  
23     made earlier with respect to this line of inquiry. We  
24     have an agreement with Upsher-Smith that they were not  
25     to pursue the issue of Upsher-Smith's financial

1 condition as a defense.

2 Now, I had to get into that to some degree,  
3 Your Honor will recall that you limited the testimony  
4 of this witness simply to providing underpinning for  
5 his opinion and not coming in for the truth of what he  
6 was stating, but I had to deal with him on that issue,  
7 because we did not have a similar agreement with  
8 Schering, but we do have such an agreement with  
9 Upsher-Smith, and this line of inquiry should be  
10 entirely foreclosed by Upsher-Smith.

11 MR. GIDLEY: Your Honor, I am invoking the rule  
12 of completeness. He's shown the witness part of this  
13 exhibit without showing the witness all of the exhibit.  
14 Therefore, our paper record is misleading without  
15 showing the witness these other pages that Mr. Orlans  
16 skipped.

17 MR. ORLANS: Well, I somehow believe that Mr.  
18 Schildkraut should be able to take care of the rule of  
19 completeness, Your Honor, for purposes of this issue.

20 JUDGE CHAPPELL: I am going to sustain the  
21 objection. I think I limited admissibility in this  
22 area to the support of his opinion and not regarding --  
23 not to be used as the true financial condition of  
24 Upsher. To the extent there was a need to  
25 rehabilitate, Schering's attorney could have done that.

1 Let's move along.

2 MR. GIDLEY: Very good, Your Honor. Excuse me,  
3 let me go on to the next group of exhibits.

4 BY MR. GIDLEY:

5 Q. Dr. Addanki, do you recall extensive  
6 questioning today about a 50 percent price differential  
7 including a reference to testimony of Mr. Coleman, and  
8 you may recall that you were shown a portion of his  
9 deposition transcript where there was testimony about a  
10 50 percent price difference between K-Dur 20 and the  
11 introductory pricing on the Klor Con M20. Do you  
12 recall that?

13 A. I do, sir.

14 Q. Now, sir, you're familiar with the Bresnahan  
15 report, are you not?

16 A. I am.

17 Q. And sir, one of the arguments that Professor  
18 Bresnahan -- and are you familiar with Professor  
19 Bresnahan's product market?

20 A. Yes. If I remember right, it was 20  
21 milliequivalent tablets and capsules.

22 Q. And part of the reason why Professor Bresnahan  
23 gets to that conclusion is a price difference. Is that  
24 not correct?

25 A. I believe that's part of his argument, yes.

1           Q. All right. I'm showing you page 43 of the  
2   Bresnahan report. I can hand this to you. Do you see  
3   the reference at the top line there about a 30 percent  
4   price advantage?

5           A. Yes, sir.

6           Q. And sir, does this -- is this your  
7   understanding of one of the arguments Professor  
8   Bresnahan is using in defining a narrow product market  
9   in this case?

10          A. Yes, it is.

11          Q. All right, sir. Now, after September 1, 2001,  
12   Klor Con M20 began to be sold in the United States,  
13   correct?

14          A. Yes, sir.

15          Q. And if we just assume hypothetically that Mr.  
16   Coleman's testimony is correct and that there's a 50  
17   percent price differential, what does this suggest to  
18   you about whether or not Klor Con M20 and K-Dur 20 are  
19   in the same product market, just looking at price?

20          A. Well, certainly that's a bigger price  
21   differential that has been used in this note to  
22   conclude that the 10s are not in the same market as the  
23   20s. So, it would seem to me that logic would dictate  
24   that M20, Klor Con M20, being 50 percent, based on the  
25   testimony, of the price of K-Dur 20, couldn't be in the

1 same market as K-Dur 20.

2 Q. Now, sir, after September 1, complaint counsel  
3 invoked this chart. Are you familiar with it, CX 1586?

4 A. Yes, sir.

5 Q. Now, is this an argument based on price or  
6 sales?

7 A. Well, the chart shows sales. I'm not sure that  
8 the argument that they're making doesn't involve price  
9 in some way, but the chart certainly shows sales.

10 Q. And sir, what is your view of the reason for  
11 the decline in the fall of 2001 in this chart, CX 1586?

12 A. Well, there were certainly A-B rated --  
13 substitution to A-B rated generic M20 going on.

14 Q. And sir, do you understand that mandatory state  
15 substitution laws would require that certain  
16 prescriptions be filled with an A-B substitute?

17 A. Yes, sir.

18 Q. And sir, what's your view of the competitive  
19 impact of those mandatory state substitution laws on  
20 the ability of K-Dur 20 to compete with Klor Con M20?

21 A. Well, Klor Con -- K-Dur 20 would be foreclosed  
22 from being filled unless it were prescribed as a DAW.

23 Q. I'm sorry, the last part of your answer was  
24 what?

25 A. Unless it were prescribed as a dispense as



1 written prescription.

2 Q. All right, sir. Let me direct your  
3 attention -- I think we now have an identifying number  
4 on this exhibit. You covered this late in the day.

5 MR. ORLANS: It's 1713.

6 THE WITNESS: Is that the IMS data?

7 BY MR. GIDLEY:

8 Q. I've got this one highlighted, and it will  
9 expedite an examination late this evening.

10 A. Is this the IMS data, sir?

11 Q. Yes, I'm showing you what Mr. Orlans showed  
12 you.

13 A. Yes.

14 Q. And sir, what I'd like you to do is compare  
15 December 1999 activity with December 2000 activity on  
16 the lines that apply to Ethex 10. Do you see that?

17 A. Yes, sir.

18 Q. And sir, what's the difference in extended  
19 units, the middle line, between December '99 and  
20 December 2000 for Ethex 10?

21 A. It goes from 56 -- 55.6 million to about 41.

22 Q. So, that's a reduction in extended unit sales?

23 A. Yes.

24 Q. What happens to the price between December 1999  
25 and December 2000?

1           A. It went from 7.4 cents to 9.2 cents.

2           Q. And sir, that change of about 1.8 cents per  
3 unit, I will represent to you and give you a calculator  
4 if you need it, reflects a decrease in unit sales of  
5 about 27.9 percent according to my calculator. Does  
6 that look about right?

7           A. Did you say about 27 percent?

8           Q. That's what we calculated, sir.

9           A. That sounds about right.

10          Q. So, the increase in price, at least nominally,  
11 led to a decrease in units, if we just look at this --  
12 at these two data points. Is that the conclusion you  
13 draw?

14          A. Well, certainly there was that increase in  
15 price of about 1.8 cents on 7.4 cents, which is about a  
16 25 percent increase in price, and about a 28, 27-28  
17 percent decline in volume, that's right.

18          Q. Does that suggest anything to you, holding  
19 aside promotional dollars which I don't have here by  
20 month, setting aside promotional dollars, does that  
21 suggest anything to you about the demand elasticity for  
22 potassium?

23          A. For Ethex do you mean?

24          Q. Yes, sir.

25          A. Well, if you simply divided those numbers,

1     you'd end up with an elasticity of a little over one,  
2     1.-something.

3           Q. Did those units in your view go somewhere else  
4     in the marketplace?

5           A. Yes, I'm sure they did.

6           Q. Would there have been other choices for  
7     consumers at this time?

8           A. Yes, sir.

9           Q. Let me direct your attention back to the  
10    binder. This is CX 19, which is at tab 14 of your  
11    first binder. This is a document Mr. Orlans showed you  
12    which talked about at one point in 100 percent segment  
13    sales for K-Dur 20. Do you recall that examination?  
14    That was at page 247, and what we have in the ELMO is  
15    the 1997 Klor Con tablets marketing plan.

16          A. Yes, sir.

17          Q. Sir, I'd like to direct your attention a little  
18    bit earlier in the document so we can understand the  
19    context of these Upsher marketing documents a little  
20    bit better. Could I direct your attention, sir, to  
21    228, USL 15228? And Dr. Addanki, I'd like to direct  
22    your attention to the second paragraph, first sentence,  
23    which reads as follows:

24                 "In the 10/20 mEq market, the focus has been on  
25    price with continued growth from generics such as Ethex

1 and new entries from Apothecon, ESI Lederle, Medeva and  
2 Biocraft in 96. The major brands have started to trade  
3 price for volume to compete with strong generic  
4 competition."

5 Do you see that?

6 A. Yes, I do, sir.

7 Q. Now, what conclusions do you draw about  
8 competition for potassium chloride from that passage,  
9 if anything?

10 A. I think it's exactly the kinds of things that I  
11 was talking about earlier, that there's a lot of  
12 competition and everyone is competing with everyone  
13 else.

14 Q. Now, sir, directing your attention to page 235,  
15 which says at the top the "10/20 mEq Market," do you  
16 see that?

17 A. Yes, sir.

18 Q. Now, what's the first firm that the  
19 Upsher-Smith executives profiled in connection with the  
20 10/20 mEq market?

21 A. Schering.

22 Q. And what's the second firm, sir?

23 A. Robbins, Micro-K.

24 Q. And what's the third firm on that page, sir?

25 A. It's the Ethex capsule.

1           Q. All right, sir. We're finished with that, you  
2 can set that aside.

3           I want to ask you a few questions about Dr.  
4 Bresnahan, if I could. Do you remember earlier in the  
5 cross examination today there was discussion of price  
6 discrimination?

7           A. Yes, sir.

8           Q. Did Dr. Bresnahan in his report study price  
9 discrimination?

10          A. You know, I don't recall that he did.

11          Q. Did he identify -- strike that.

12                 Did Dr. Bresnahan do any kind of statistical  
13 work on a price/cost ratio of K-Dur 20 over the years?

14          A. Again, not that I'm aware of.

15          Q. Do you know whether Dr. Bresnahan in his report  
16 studied a time series of price data for branded  
17 competitor pricing of potassium chloride? Do you  
18 recall that?

19          A. I don't recall it right now.

20          Q. Let me direct your attention to some of the  
21 questioning you received on Thursday, and do you recall  
22 at one point you were asked to consider an average  
23 price combining K-Dur 20 with Klor Con M20 after  
24 September 1, 2001? Do you recall that, sir?

25          A. Yes, sir.

1           Q. And sir, to calculate an average price, what  
2           prices would you need besides K-Dur 20 and Klor Con M20  
3           if you were going to look at the potassium chloride  
4           market in the fall of 2001?

5           A. You would need the prices of the other  
6           potassium chloride supplements being sold as well as  
7           their volumes.

8           Q. I'm going to ask you a couple of hypothetical  
9           questions, but I want to ground them with something a  
10          little bit more specific.

11                   This is a demonstrative, Mr. Orlans, that we're  
12          going to use for this question, this series of  
13          questions.

14                   May I approach, Your Honor?

15                   JUDGE CHAPPELL: Yes, you may.

16                   (USX Exhibit Number 1580 was marked for  
17          identification.)

18                   MR. GIDLEY: We would designate this, Your  
19          Honor, USX 1580, and it's a series of receipts --  
20          actually, price quotes, excuse me, that my colleagues  
21          obtained over the last two business days, and I'm not  
22          offering them for the truth of the matter asserted.

23                   BY MR. GIDLEY:

24                   Q. I just want to have context late in the day for  
25          you and I to ask a couple of questions, and we went to

1 a couple of independent pharmacies. We went to one  
2 pharmacy on the first page on February 28th and asked  
3 about K-Dur 20 and then asked for a generic substitute,  
4 and they told us they didn't have the M20 or Qualitest.  
5 They told us why don't you just use the Klor Con 10s at  
6 200. You see the two prices.

7 Turning the page, we went to another pharmacy.  
8 We asked about K-Dur 20, and then we asked about a  
9 substitution, and the only generic they pointed us to  
10 was Micro-K 10 mEq.

11 On the third page of this demonstrative, we  
12 went to Medicine Shoppe and again asked about K-Dur 20,  
13 100 tablets, and they said, why don't you take a look  
14 at Ethex's at 200 tablets.

15 Then finally on the fourth page, we have got  
16 another price quote from an area independent, K-Dur 20,  
17 a hundred tablets at 49 or so, and they told us why  
18 don't you buy 200 tablets of Ethex 10 mEq.

19 MR. ORLANS: Your Honor, I am not sure if  
20 there's a question here, but I certainly object to  
21 this. Mr. Gidley's extensive testimony demonstrates  
22 why we can't permit this to be used in questioning.  
23 Obviously he provided significant underpinnings to  
24 explain these documents, and we have no way of  
25 validating that.

1           Indeed, he described Micro-K as a generic  
2 competitor. In fact, we know Micro-K is a brand. So,  
3 the reliability of this strikes me as questionable at  
4 best.

5           MR. GIDLEY: Your Honor, I'm not offering it  
6 for the truth of the matter asserted. It's as a  
7 demonstrative. It's as if I typed up a hypothetical.  
8 I'm going to ask this expert witness one or two  
9 hypotheticals and move on to another topic.

10          JUDGE CHAPPELL: You don't care if it's  
11 reliable or not?

12          MR. GIDLEY: That's right.

13          JUDGE CHAPPELL: You don't care if it's true or  
14 false. You're merely building assumptions into a  
15 hypothetical?

16          MR. GIDLEY: Yes, Your Honor.

17          JUDGE CHAPPELL: I'll allow it. Overruled.

18          BY MR. GIDLEY:

19          Q. Dr. Addanki, if we were to try to calculate an  
20 average market-wide price for potassium chloride,  
21 including K-Dur 20 and its substitutes, I ask you, sir,  
22 would we need a fair amount of data from pharmacies and  
23 from others if we were to try to calculate the average  
24 price for consumers?

25          A. Absolutely.



1           Q. Sir, general question, do pharmacies compete  
2 with one another for patients and for customers?

3           A. Yes, sir.

4           Q. What are some of the ways that they compete for  
5 customers in your experience or based on your expert  
6 report and work?

7           A. Well, we've certainly heard some testimony that  
8 they compete on service. I'm aware that they compete  
9 on service. They compete on price in some instances,  
10 many instances they compete on price. Service and  
11 price, absolutely.

12          Q. Going back to the price quotes I handed you,  
13 if, in fact, these independent pharmacists weren't  
14 carrying Klor Con M20 but they were carrying these 10  
15 mEq products, in order to calculate an average price,  
16 would we need to specifically include 10 mEq potassium  
17 chloride to calculate an average price at this point in  
18 time?

19          A. Yes, you'd need to know what the average price  
20 was for the 10s as well as the volumes.

21          Q. You were asked on Thursday about a court  
22 decision known as Indiana Federation of Dentists.  
23 You'll be happy to know I'm not going to ask you about  
24 that court case. I want to simply reference that cross  
25 examination and ask you one or two questions.

1           In your view, Dr. Addanki, why is defining a  
2   relevant product market important to analyzing the June  
3   17, 1997 agreement?

4           A.   It's because that's what lets us reach an  
5   educated opinion about the potential for there to be  
6   monopoly power, and it's the monopoly power screen  
7   that's essential for us to get through first before we  
8   do anything else in evaluating an agreement like this.

9           Q.   You were asked a couple of questions today  
10   about products with all kinds of different prices.  
11   Sir, is it your view that for products to compete in a  
12   relevant market, that all of the prices have to be very  
13   close to one another?

14          A.   No, sir.

15          Q.   Why not?

16          A.   Because products compete along different  
17   dimensions, and price is one of them. Generics offer a  
18   different bundle of attributes from what branded  
19   products do in all sorts of markets, not just  
20   pharmaceuticals, and as I said, price is only one of  
21   the attributes of the products and one of the  
22   dimensions of competition.

23          Q.   I want to show you, sir, another document,  
24   CX 1480. You were asked questions about this earlier.

25          A.   Is that in the book here?

1 Q. I'm not sure.

2 A. It doesn't matter.

3 MR. GIDLEY: Do you know whether it's in your  
4 book, Mel?

5 MR. ORLANS: I think it's tab 5.

6 BY MR. GIDLEY:

7 Q. Tab 5, sir.

8 A. In book 1?

9 Q. Thank you.

10 And for the record, this is CX 1480, SP 89826.  
11 First on page 1, I've given you some yellow  
12 highlighting. What are some of the products that  
13 Schering at this point in time was considering  
14 competitive with K-Dur as you interpret this document,  
15 sir?

16 MR. ORLANS: This is -- Your Honor, I am going  
17 to object to that characterization. This is not a  
18 Schering document. These are --

19 MR. GIDLEY: It says "Schering Market Analysis"  
20 at the bottom and it's got an SP Bates number. It's my  
21 understanding, Mel --

22 MR. ORLANS: My understanding is this is  
23 Schering's summary of IMS data.

24 MR. GIDLEY: Very well, sir.

25 BY MR. GIDLEY:

1           Q.   Someone at Schering summarized the IMS data,  
2           and I'm showing you the first page.  What are some of  
3           the other competitive products at this time period in  
4           potassium chloride?

5           A.   In addition to the K-Durs, there's Micro-K,  
6           Slow K, K-Tab, Klor Con 8 and Klor Con 10, generic KCl  
7           tab/caps and other tab/caps and all other.

8           Q.   I'd like to direct your attention to one of the  
9           pages I believe Mr. Orlans showed you, which is Bates  
10          numbered 838, and this is a page, I believe it's  
11          expressed in terms of TRX, but it purports to provide  
12          some data on sales activity and sales trends in this  
13          overall marketplace apparently per IMS.  Are you there?

14          A.   Yes, sir.

15          Q.   And sir, directing your attention to the line  
16          that says Klor Con 10, it begins 273 and then reading  
17          across, you go all the way to the right-hand column?

18          A.   Yes, sir.

19          Q.   Do you see it's got "Year to Date '01 Sales,"  
20          and then it's got percent change?

21          A.   Yes.

22          Q.   And sir, for Klor Con 10 in 2001, did Klor Con  
23          10 gain in the units here, which I think is TRX?

24          A.   Yes, it did gain.

25          Q.   Yes, so about 8 percent?

1 A. That's what the number is here that's reported.

2 Q. And sir, I see that K-Dur 20 went down, that's  
3 minus 13 percent. Do you see that?

4 A. Yes, sir.

5 Q. That's about four lines from the top, but so  
6 did K-Dur 10, correct, sir?

7 A. Yes.

8 Q. By the way, directing your attention down to  
9 the bottom, four lines from the bottom, generic KCl  
10 tab/capsule, all the way across?

11 A. Yes.

12 Q. And sir, what is the year-over-year change in  
13 the generic potassium chloride '00 versus '01?

14 A. For tab/caps?

15 Q. Yes.

16 A. It's 7 percent.

17 Q. And that's positive?

18 A. Yes.

19 Q. And they gained sales in this time period?

20 A. Yes, sir.

21 Q. Did Professor Bresnahan -- new topic -- did  
22 Professor Bresnahan analyze Schering's costs in any  
23 way?

24 MR. ORLANS: Your Honor, I'm going to object as  
25 beyond the scope of direct.

1           MR. GIDLEY: Your Honor, there must have been a  
2   hundred cross questions comparing Bresnahan to Addanki.  
3   I'm entitled to four or five despite the hour.

4           MR. ORLANS: Actually, Your Honor, I think I  
5   deliberately tried to avoid that. Dr. Addanki kept  
6   trying to bring in Dr. Bresnahan. I think I  
7   steadfastly tried to stay away from Dr. Bresnahan.

8           Well, it actually wasn't that funny, but I  
9   meant in terms of trying to elicit an opinion from this  
10   witness regarding Dr. Bresnahan.

11          JUDGE CHAPPELL: Well, I am going to overrule  
12   the objection at this time. He's laying a foundation.  
13   Let me see where he's going.

14          BY MR. GIDLEY:

15          Q. Do you remember the question? I asked you  
16   whether Dr. Bresnahan analyzed cost in preparing his  
17   August 15, 2001 report.

18          A. I -- I don't see -- recall seeing any evidence  
19   that Dr. Bresnahan had looked at Schering's costs.

20          Q. Now, Mr. Orlans asked you on cross about some  
21   time trends which purported to show that the price of  
22   K-Dur 20 had risen over a period, say, '96 to 2000. Do  
23   you recall those questions?

24          A. Yes, sir.

25          Q. Do you know whether that's a net price

1       increase, net of costs?

2           A.   No, I would assume it isn't actually.

3           Q.   Is there any place to turn in Professor  
4   Bresnahan's report to determine whether there's been a  
5   net real gain in price, factoring in rebates and free  
6   goods and factoring in costs?

7           A.   Not that I'm aware of.

8           Q.   I want to direct your attention now to a  
9   different document.  We're almost done, I appreciate  
10  your patience tonight.

11          A.   Not at all, sir.

12          Q.   And everyone else's.  I will give you one  
13  caution, this is lawyers doing math, and I'm showing  
14  you this chart we talked about earlier I guess on  
15  cross, K-Dur 20 did not enjoy a price premium, using  
16  some IMS data, I guess it came in on your direct and  
17  then you got crossed on it.  Do you recall that  
18  exhibit?

19          A.   Yes, I do.

20          Q.   What I have done, and please accept my  
21  representation, I have calculated, sir, the change in  
22  price between '96 and 2000.  Do you see that?

23          A.   Yes, sir.

24          Q.   And sir, I've highlighted four lines that are  
25  products that grew between 1996 and 2000 according to

1       this data faster than the rate the price increase for  
2       K-Dur 20. Do you see that?

3           A. Yes, sir.

4           Q. Now, sir, I notice that K-Dur 10 rose faster  
5       than K-Dur 20. Does that imply that K-Dur 10 is a  
6       monopoly?

7           A. No, sir.

8           Q. Is that a conclusion you would draw based on  
9       all the data that you have reviewed?

10          A. No.

11          Q. How about Micro-K, is Micro-K is monopoly? It  
12       raised it's price 61 percent in the 8s States and 78  
13       percent according to my math in the 10s. Is that a  
14       monopoly?

15          A. No, sir.

16          Q. How about Ethex 10, which raised its price 54  
17       percent according to this IMS data, is that a monopoly?

18          A. No, sir.

19          Q. In fact, sir, do you believe that those  
20       products compete with one another in the same product  
21       market?

22          A. I believe that they do, and together with  
23       others.

24          Q. Sir, have you reviewed a chapter in Professor  
25       Bresnahan's book, a book he edited, The Economics of



1 New Goods?

2 MR. ORLANS: Your Honor, I am going to object  
3 again. This is beyond the scope of cross examination.

4 MR. GIDLEY: Your Honor, this is literature,  
5 economic literature, on the effects of advertising and  
6 promotion. The door was opened by a book, a binder,  
7 Your Honor, of six different economic literature  
8 studies that were shown to Dr. Addanki.

9 JUDGE CHAPPELL: I'll allow it. Overruled.

10 MR. GIDLEY: I will be brief. Thank you, Your  
11 Honor.

12 BY MR. GIDLEY:

13 Q. I'm showing you what's been marked as USX 1090.  
14 This is a study by Ernst Berndt and some colleagues  
15 that is published in Dr. Bresnahan's book, and this  
16 study basically looked at four ulcer drugs, including  
17 Tagamet, Pepcid and some other drugs. I just want to  
18 go to the conclusion, Dr. Addanki, and ask you a  
19 question or two.

20 This was a regression analysis, Dr. Addanki,  
21 and in the concluding remarks, which sometimes are the  
22 only things that lawyers can figure out, it says,  
23 "Second, we find that at the industry level, both  
24 cumulative minutes of detailing and cumulative pages of  
25 medical journal advertising affect sales," and so on.

1                   Do you see that?

2           A.   Yes, sir.

3           Q.   Is that consistent with your report?

4           A.   It is consistent with my report that  
5   advertising and promotion matter, yes, sir.

6           Q.   I want to direct your attention to the next  
7   page where the authors address some of the welfare and  
8   policy implications of their research, and directing  
9   your attention to the highlighted sentences, I'd just  
10   like your quick comment.

11               "The results of this paper are of considerable  
12   interest in the current health care reform debate.  
13   Critics of the pharmaceutical industry have argued that  
14   much detailing is merely aimed at market share and is  
15   socially wasteful. The findings in this paper suggest  
16   that marketing efforts play a very important role in  
17   the diffusion of information to physicians, although  
18   the degree to which this is true probably declines  
19   somewhat as the number of products in a market  
20   increases."

21               Do you see that?

22           A.   Yes, sir.

23           Q.   And what would be your view of this passage?  
24   What are your policy implications for advertising and  
25   promotion in the pharmaceutical industry?

1           A. Well, certainly I think that advertising and  
2 promotion can be a very important aspect and dimension  
3 of competition, and I think in this case, they could  
4 well have been because of the amount of information  
5 that Schering-Plough was disseminating.

6           Q. Close to the end, Doctor.

7                     Let me show you what is -- what you were shown  
8 earlier today as CX 43. I'll try to be brief. It's a  
9 little hard to read, but we looked at it earlier today.

10                    This appears to be data from IMS in December of  
11 1996, and the highlighted box I believe is something  
12 Mr. Orlans asked you about. Across the line that says  
13 20 mEq, presumably for K-Dur, appears 2737, which I  
14 believe you were asked or it was represented to you was  
15 2.7 million prescriptions "dis as writ" or dispense as  
16 written. Do you see that?

17           A. Yes, sir.

18           Q. Mr. Orlans asked you some questions about that,  
19 did he not?

20           A. Yes, sir.

21           Q. I want to compare that number of prescriptions  
22 in 1996 to the total number of prescriptions for K-Dur  
23 20, and I am going to show you, sir, CX 1389, which is  
24 also in the Mel Orlans binder that you were shown on  
25 cross examination, if we can get the ELMO right here,

1       sir.

2               Do you see under 1996 Volume, it says 10.2  
3       million prescriptions, total K-Dur, and below that, 8.8  
4       million K-Dur 20?

5           A.   Yes, sir.

6           Q.   From 1996, do you see that?

7           A.   Yes, sir.

8           Q.   Comparing those two figures, 8.8 million with  
9       the 2.7 million that were dispense as written, what is  
10      your conclusion about the number of K-Dur prescriptions  
11      expressed in terms of TRX that are not restricted to  
12      dispense as written in this time period?

13          A.   As I testified during cross, I'm not sure what  
14      the sample is or how this was done exactly, and so it's  
15      pretty clear based on what you've just pointed out that  
16      this is based on a -- this -- it leaves out an awful  
17      lot of prescriptions. I don't know what it's done with  
18      them, and I don't know where they show up. So, it's  
19      certainly clear that the 2.7 million they're talking  
20      about here is about a third, a little more perhaps, of  
21      the total prescriptions written for K-Dur. So, it's  
22      not clear to me what you can draw from this.

23          Q.   So, would two-thirds not be dispense as  
24      written, is that the conclusion you draw from these two  
25      data points?

1           A. I don't know, because I don't know if these are  
2       prescriptions that were dispense as written or were  
3       written to be DAWs.

4           Q. Do you know how IMS deals with the scenario  
5       where the doctor writes the prescription for K-Dur 20,  
6       the pharmacist gets the prescription and then calls the  
7       doctor and asks him to change his prescription, do you  
8       know whether that becomes a new TRX or an NRX or do you  
9       know?

10          A. I don't recall.

11          Q. You were shown a 1983 article from Dr. Ordovery  
12       and Dr. Willig, and you were asked about a passage. I  
13       just want to show you a passage you were not shown by  
14       complaint counsel, and I'll just put it on the ELMO and  
15       hopefully we'll get it zoomed in. We have got to get  
16       it zoomed out.

17                 "The first stage of the Ordovery and Willig  
18       test -- the structural analysis -- employs concepts  
19       that are quite familiar to antitrust analysts. As in  
20       many antitrust cases, the plaintiff must prevail on a  
21       definition of the relevant markets that suggests a  
22       degree of concentration sufficient for a finding of  
23       monopoly power. And because the threat of entry  
24       constrains the pricing behavior of even a 100%  
25       monopolist, the plaintiff must demonstrate the presence

1 of entry hurdles; such a demonstration is equally  
2 relevant to any antitrust case that requires a showing  
3 of market power."

4 Do you see that?

5 A. Yes, sir.

6 Q. And do you see that it uses both "monopoly  
7 power" and "market power"?

8 A. Yes.

9 Q. And sir, is that your view of entry, that if  
10 entry is easy or barriers to entry are low, that the  
11 exercise of market power or monopoly power could be  
12 thwarted?

13 A. Absolutely, yes.

14 Q. Do you agree that the plaintiff should show  
15 these things in analyzing from a policy and economic  
16 standpoint the kinds of patent infringement settlements  
17 we've been discussing in this courtroom?

18 A. Yes, this, in fact, exactly is what's  
19 represented in my test.

20 Q. Finally, at the very beginning of cross  
21 examination, you were asked whether your opinion had  
22 ever been rejected by a Federal Court. I'm going to  
23 ask you a different question. Has your opinion ever  
24 been accepted by a Federal District Court?

25 A. Yes, it has.

1           Q. Has it ever been accepted on relevant product  
2 market?

3           A. Yes, sir.

4           Q. Can you give me an example?

5           A. Well, in the Moore v. Wallace case, which was  
6 an antitrust case involving inquiry into a merger,  
7 the -- the court adopted my conclusions regarding the  
8 market and I think pretty much regarding the analysis  
9 to be performed, and if I remember right, the expert on  
10 the other side was Professor Hausman, Jerry Hausman.

11          Q. Now, is Professor Hausman a well-known, well-  
12 regarded, reputable economist?

13          A. He's certainly well known and reputable.

14          Q. In fact, he's from that other school in  
15 Cambridge, MIT?

16          A. Yeah, we don't talk about it much, but yeah.

17          Q. All right, sir, I'm not going to ask you any  
18 legal conclusions, but in the case, which is reported  
19 at 970 F. Supp. 1545, you were shown passages where you  
20 lost. I just want to show you where you won and see  
21 what your view is.

22                 After doing an extensive Brown Shoe analysis,  
23 the Court concludes, "Low barriers to entry into the  
24 market invite entry by new competitors and also expose  
25 firms well established in the market to the threat of

1 potential entry. This in turn can induce those firms  
2 to hold prices, services, quality, and developments at  
3 competitive levels."

4 Do you see that?

5 A. Yes, sir.

6 Q. Sir, do you agree with that as a matter of  
7 economic theory?

8 A. Yes.

9 Q. Do you believe that that's true of the  
10 potassium chloride market based on everything you've  
11 studied to date, sir?

12 A. Certainly based on the amount of entry that's  
13 occurred, I do believe that's true.

14 MR. GIDLEY: Your witness.

15 JUDGE CHAPPELL: Recross?

16 RECROSS EXAMINATION

17 BY MR. ORLANS:

18 Q. Okay, Dr. Addanki, Mr. Gidley just discussed  
19 with you among other things CX 43, which you and I had  
20 talked about. Do you recall that?

21 A. Yes, I do, sir.

22 Q. Okay. And in fact, that document doesn't  
23 purport to be an exhaustive listing of all  
24 prescriptions. It's a sample. Isn't that right, sir?

25 A. As I told you, I don't know what this document



1 is. I mean, I don't recall seeing it, so I can't  
2 really tell you what the province and --

3 Q. You don't understand that to be a sample?

4 A. I couldn't tell you what this is.

5 Q. Okay. Mr. Gidley asked you whether you ever  
6 saw Upsher-Smith characterize K-Dur 20 as a monopoly,  
7 and I believe you answered no. Do you recall that?

8 A. I think I answered not that I had recalled.

9 Q. Okay. You did see some documents from  
10 Upsher-Smith which we discussed which indicated that  
11 K-Dur was in a market where it had 100 percent of the  
12 market, though, didn't you?

13 MR. SCHILDKRAUT: Objection. I think that  
14 mischaracterizes the testimony.

15 THE WITNESS: We certainly saw documents  
16 where --

17 JUDGE CHAPPELL: Hold on, hold on.

18 THE WITNESS: Pardon me, sir.

19 MR. ORLANS: I don't think I even referred to  
20 testimony, Your Honor. I think I just asked him  
21 whether he had seen documents that reflected 100  
22 percent.

23 JUDGE CHAPPELL: I'll overrule the objection.

24 Susanne, can you read the question back,  
25 please?

1 (The record was read as follows:)

2 "QUESTION: You did see some documents from  
3 Upsher-Smith which we discussed which indicated that  
4 K-Dur was in a market where it had 100 percent of the  
5 market, though, didn't you?"

6 THE WITNESS: I did see documents where they  
7 were characterizing various things as markets, and one  
8 of them was K-Dur.

9 BY MR. ORLANS:

10 Q. And finally, Doctor -- and when I say finally  
11 this time, I mean it -- let me ask you to turn first to  
12 CX 18, it's under tab 11, and do you remember Mr.  
13 Gidley pointed you to page 64 where there was a  
14 discussion of total promotional dollars needed for  
15 1997? Do you recall that, sir?

16 A. Yes.

17 Q. And the number that you read out there was \$9  
18 and a half million. Is that right?

19 A. Yes.

20 Q. Okay. And sir, let me ask you to turn now to  
21 tab 2, which is CX 695, and if you add together -- this  
22 is page 698. Do you see that? And if you add  
23 together, sir, under Actual the total promotion numbers  
24 and the total selling numbers, in fact, the actual  
25 promotion and sales numbers in 1997 were \$6,300,000,

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1 correct?

2 A. Where are you?

3 Q. I'm on page 698. This is Volume 1, tab 2,  
4 CX 695.

5 A. Yes, just a minute.

6 Q. Do you see page 6 -- are you on page 698?

7 A. I'm on page 698.

8 Q. Okay, and if you go across the column -- excuse  
9 me, across the line for Total Promotion and down the  
10 column for Actual --

11 A. Right.

12 Q. -- do you see total promotion is \$5,134,000?  
13 Do you see that?

14 A. Yes.

15 Q. Okay, and then the total selling is \$1,200,000,  
16 correct?

17 A. Yes.

18 Q. So, if you add those two up, the total  
19 promotion numbers including selling numbers, actual  
20 figures were \$6.3 million, right?

21 A. Certainly those two numbers add up to \$6.3  
22 million, that's right.

23 MR. ORLANS: I have nothing further, Your  
24 Honor.

25 JUDGE CHAPPELL: Anything further?

1 MR. GIDLEY: One last question, Your Honor.

2 FURTHER REDIRECT EXAMINATION

3 BY MR. GIDLEY:

4 Q. Let's take the \$6.3 million. Sir, do you  
5 recall what the comparative spend was from Upsher-Smith  
6 in the 1996 or '97 time period for Klor Con tablets for  
7 marketing and promotion?

8 A. I think it was -- it was orders of magnitude  
9 smaller than that.

10 Q. Ten or 20 times smaller?

11 A. Something like that, yes.

12 Q. Would that influence sales, that difference?

13 A. Certainly that would drive share, yes.

14 MR. GIDLEY: No further questions.

15 MR. ORLANS: Nothing further, Your Honor.

16 JUDGE CHAPPELL: Thank you, Dr. Addanki.

17 You're excused.

18 THE WITNESS: Thank you, sir.

19 JUDGE CHAPPELL: We will recess until 10:30  
20 tomorrow morning.

21 (Whereupon, at 7:20 p.m., the hearing was  
22 adjourned.)

23

24

25

## 1 C E R T I F I C A T I O N O F R E P O R T E R

2 DOCKET/FILE NUMBER: 9297

3 CASE TITLE: SCHERING-PLOUGH/UPSHER-SMITH

4 DATE: MARCH 4, 2002

5

6 I HEREBY CERTIFY that the transcript contained  
7 herein is a full and accurate transcript of the notes  
8 taken by me at the hearing on the above cause before  
9 the FEDERAL TRADE COMMISSION to the best of my  
10 knowledge and belief.

11

12 DATED: 3/5/02

13

14

15

16 SUSANNE BERGLING, RMR

17

## 18 C E R T I F I C A T I O N O F P R O O F R E A D E R

19

20 I HEREBY CERTIFY that I proofread the  
21 transcript for accuracy in spelling, hyphenation,  
22 punctuation and format.

23

24

25 SARA J. VANCE

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